Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAM B. MCQUEEN,
Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that the Takings Clause of the Fifth Amendment to the United States Constitution prescribes the following rule: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (footnote omitted).

The question presented is whether an owner has suffered a taking when he proves that a regulation deprives him of all economically beneficial use of his property without also proving that it frustrates his distinct or reasonable investment-backed expectations.

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Sam B. McQueen respectfully petitions this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 530 S.E.2d 628 (S.C. 2000) and reprinted in the appendix hereto (Pet. App.) at 1a. The opinion of the South Carolina Court of Appeals is reported at 496 S.E.2d 643 (S.C. Ct. App. 1998) and reprinted at 15a. The final order of the South Carolina Court of Common Pleas is unreported and reprinted at 35a.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 17, 2000. A petition for rehearing was denied on May 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Takings Clause of the Fifth Amendment to the United States Constitution declares, "[N]or shall private property be taken for public use, without just compensation."

INTRODUCTION

"It is *uncontested* the permit denial at issue here deprives [Petitioner] of all economically viable use of his property." Pet. App. 4a (emphasis added). This fact makes Mr. McQueen's loss "a textbook taking." *Id.* at 28a. Yet the South Carolina Supreme Court denied his claim on the sole ground that he "failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 14a. This decision creates a deep national split of authority among U.S. Courts of Appeals and state courts of last resort. For that and other reasons, fully set out below, this Court ought to grant certiorari.

STATEMENT

1. Petitioner Sam B. McQueen, a farmer, owns two noncontiguous residential lots of real property in North Myrtle Beach, South Carolina. *Id.* at 45a; R. 203–04.[1] In 1961 he paid $2500 for a lot on 53rd Avenue (Lot A), and in 1963 he paid $1700 for another lot, located five blocks away on 48th Avenue (Lot B). Pet. App. 1a, 45a. Since buying the lots he has regularly paid taxes on them, *id.* at 36a, and the assessor had valued them at $22,800 per lot when this action was brought. *Id.* at 1a. Like the surrounding lots, his property was created from backfill and sits adjacent to man-made, saltwater canals. *Id.* at 1a–2a. Virtually all of the neighboring lots have houses on them with bulkheads facing the canal. *Id.* at 2a, 37a. But Mr. McQueen's property remains in its natural state. *Id.* at 2a, 37a.

In 1977, more than a decade after McQueen bought his property, the South Carolina General Assembly enacted the Coastal Zone Management Act (Act), S.C. Code Ann. §§ 48-39-10–220 (1993). The Act is intended "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." *Id.* at § 48-39-30(A). By the time McQueen sought to improve his property, the Act made it unlawful to "fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." *Id.* at § 48-39-130(C). Violating this prohibition was a misdemeanor, which carried penalties of up to six months' imprisonment and a $5000 fine for a first offense and one year's imprisonment and a $10,000 fine for each additional offense. *Id.* at § 48-39-170(A).

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[1] Citations to "R" refer to the official Record on Appeal.

Civil penalties of $100–$1000 per day of violation could also be assessed. *Id.* at § 48-39-170(C).

In July 1991 McQueen applied with the South Carolina Coastal Council—the name has since changed to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM)[2]—for permits to construct a bulkhead[3] on each lot. Pet. App. 2a, 36a. By erecting bulkheads McQueen intended to halt further erosion to his property and that of his neighbors and to prepare the lots for single-family homes. *Id.* at 37a, 45a; R. 209. On January 21, 1992 OCRM issued a permit for Lot A, requiring the bulkhead to be placed 75 feet from the street. Pet. App. 45a; R. 223. Because of municipal setback requirements, McQueen asked OCRM to let him put up the bulkhead 90 feet from the street instead. Pet. App. 37a.

Meanwhile, "for some unexplained reason," *id.* at 45a, OCRM failed to respond to McQueen's permit application on Lot B. In a letter dated April 2, 1993, nearly two years after he submitted his original permit applications, OCRM told McQueen that "the only way to correct this confusion" was to "submit a new application." R. 353; Pet. App. 45a. So two months later, on June 4, 1993, McQueen resubmitted permit applications for both lots, which OCRM denied on September 13, 1993.[4] *Id.* at 38a; R. 283, 316. Its

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[2] *See* S.C. Code Ann. § 1-30-45(B) (1993).

[3] South Carolina law defines "bulkhead" as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (1993).

[4] Only OCRM opposed McQueen's permit applications. The United States Army Corps of Engineers, the South Carolina Department of Health and Environmental Control, the South Carolina Ports Authority, the South Carolina Department of Archives

(continued...)

stated reason for denying the permits was that "[t]he proposed bulkhead is located well into the tidelands critical area, so that any backfill results in the filling of tidal wetlands." R. 283, 316. OCRM added that "since the application seeks to fill a single family lot, there is no overridding [sic] public interest for this activity." *Id.* at 283, 316.

McQueen appealed this decision before an OCRM hearing officer. Pet. App. 38a. Following a hearing, the officer recommended that the agency issue a permit for Lot A, subject to the 75-foot setback and other restrictions placed on the permit in January 1992, but deny the permit for Lot B. *Id.* at 38a–39a. OCRM accepted these recommendations only in part, once again denying both permits. *Id.* at 46a.

McQueen then pressed his case before the Coastal Zone Management Appellate Panel, which issued a "final administrative order" on October 7, 1994. R. 17. The Panel determined that the Act "expressly prohibits the activity sought by McQueen." *Id.* at 21. In particular, the Panel relied on the following regulation: "The creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes shall be denied." *Id.* (quoting S.C. Code Regs. § 30-12G(2)(a)). The Panel also refused to find that "the action taken by this agency in denying both applications for fill amounts to an unconstitutional taking." *Id.* at 23. Relying on *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Panel reasoned that McQueen lacked "distinct investment-backed expecta-

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[4] (...continued)
and History, and the South Carolina Department of Wildlife and Marine Resources—all gave their approval for the construction of bulkheads on McQueen's property. Pet. App. 38a.

tions," because he "failed to act to protect his property" by seeking the necessary permits earlier. R. 23. And on that ground the Panel denied his takings claim. *Id.*; Pet. App. 46a.

2. McQueen then filed a complaint with the South Carolina Court of Common Pleas. *Id.* at 35a–36a; *see* S.C. Code Ann. § 48-39-180 (1994) (providing judicial review for "[a]ny applicant whose permit application has been finally denied . . . by the Coastal Zone Management Appellate Panel"). In his complaint McQueen sought "a review of the department's action 'de novo.'" *Id.*; *see* Pet. App. 40a; R. 33. He also alleged that the OCRM's permit denials were a "taking without compensation." *Id.* at 34; S.C. Code Ann. § 48-39-180; *see* Pet. App. 40a. The court referred the case to a master-in-equity.[5] *Id.* at 36a.

In his final order, issued February 28, 1996, the master ruled as a matter of law that McQueen had suffered a taking. *Id.* at 46a–47a. Two facts stood out. First, the master found that OCRM's definition of "critical area" swallowed each lot, leaving McQueen no portion of his property unaffected by the regulation. *See id.* at 40a. Second, the master found substantial evidence supporting McQueen's argument that OCRM's refusal to permit the construction of bulkheads deprived McQueen of all economically beneficial use of his property. *Id.* at 46a. The master cited the testimony of Mark Caldwell, an OCRM regional permit administrator, who admitted that the permit denial left McQueen's property with

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[5] Rule 53 of the South Carolina Rules of Civil Procedure authorizes a judge of the Court of Common Pleas to refer a case to a master "where the parties consent." S.C. R. Civ. P. 53(b). Unless the order of reference contains specific limitations on his authority, "the master has and shall exercise the power and authority of the court sitting without a jury." *Id.* at 53(c).

only "[r]ecreational, aesthetic use." R. 146; Pet. App. 40a. Caldwell further conceded that even these minimal uses supposedly left to McQueen were indirect:

> It's really probably not directly recreational. I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots. But a salt marsh contributes to, of course, the whole environment and plays its part in the production of shrimp, crabs, and so forth. If someone down on Hog Inlet is fishing, I mean, he may be using bait that he caught or shrimp that he caught out in the marsh that his particular lot, Mr. McQueen's particular lot helped spawn, so forth. It's kind of indirect.

R. 146–47. The master-in-equity also relied on the testimony of McQueen, Pet. App. 41a, who, referring to OCRM, said that "[t]hey don't even want me—they don't even want [my friend] Alex, which is the conservationist, to park a boat. They ran him off." R. 207.

The master found additional support for his conclusion that McQueen had suffered a taking by comparing this case with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet. App. 41a–42a. As in *Lucas*, "McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with." *Id.* at 41a. "Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads." *Id.* at 42a. Also, as in *Lucas*, no background principles of state nuisance or property law would have barred the challenged use of the property. "Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and

property law and would have been allowed prior to 1977," *id.* at 42a, when the Coastal Zone Management Act was enacted.

Having concluded that McQueen had suffered a taking, the master addressed how much compensation was just under the circumstances. McQueen had testified that he had received offers for his property of $50,000 per lot. *Id.* at 44a; R. 209. On that basis the master ordered OCRM to pay McQueen $100,000 compensation for both lots. Pet. App. 48a.

3. OCRM appealed to the South Carolina Court of Appeals, which affirmed in part, reversed in part, and remanded. *Id.* at 15a.

The court found that OCRM had lawfully denied McQueen's permit applications. "It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result." *Id.* at 20a.

The court also affirmed the master's ruling that OCRM's permit denials effected a categorical taking of McQueen's property. After quoting extensively from *Lucas*, *id.* at 22a–24a, the court reasoned that McQueen's claim bore "a remarkable similitude to *Lucas*." *Id.* at 24a. Following *Lucas*, the court held that because OCRM's permit denials left McQueen's property with no economically beneficial use, "McQueen has suffered a textbook taking." *Id.* at 28a.

The only point on which the court of appeals disagreed with the master-in-equity was the amount of compensation. Because the court found that McQueen's testimony standing alone was insufficient to support a compensation award of $100,000, it reversed and remanded to determine the amount of compensation. *Id.*

Judge Connor dissented in part, arguing that McQueen had failed to prove a compensable taking. In particular, Judge Connor distinguished McQueen's

case from *Lucas* on the ground that McQueen "failed to show he had 'investment-backed expectations.'" *Id.* at 34a. "McQueen knew his lots were eroding and failed to act to protect his property." *Id.*

4. The South Carolina Supreme Court reversed on the sole ground that McQueen "has failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 14a.

The court began its analysis by reciting the Fifth Amendment Takings Clause and the rule in *Lucas*: "The government 'takes' property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property." *Id.* at 4a (citing *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)). The court then wrote, "In order to recover on a regulatory takings claim, a property must establish" the three-part test described in *Loveladies Harbor*:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Id. (quoting *Loveladies Harbor*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).

The court acknowledged that McQueen had amply satisfied the first prong of the test. "It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* (emphasis added).

The court next addressed OCRM's contention that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d. 327 (S.C. 1984) supplied a defense to

McQueen's takings claim. *Carter* held that "an owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 329 (quoting *Just* v. *Marinette County*, 201 N.W.2d 761, 768 (1972)). Reasoning that this Court had expressly rejected the conclusory police power doctrine of *Carter*, the court below held that "The United States Supreme Court overruled *Carter* on the takings issue in *Lucas*." Pet. App. 9a.

The South Carolina Supreme Court then reached the decisive question: "Did respondent have distinct investment-backed expectations entitling him to compensation?" *Id.* It found that "[t]he Court of Appeals erred in failing to address this second prong of the regulatory takings test." *Id.* at 10a. The court explained why it regarded proof of investment-backed expectations as a necessary element of every regulatory takings claim. "Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop." *Id.* The court admitted that neither the *Lucas* nor *Loveladies Harbor* discussed investment-backed expectations. *Id.* However, it relied on *Good* v. *United States*, 189 F.3d 1355 (Fed Cir. 1999), where the U.S. Court of Appeals for the Federal Circuit refused to find a taking because the owner "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.* at 1363. The Federal Circuit found that Good lacked reasonable investment-backed expectations, because he had "wait[ed] seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1362. While conceding that "*Good* is distinguishable from the instant case

in various respects," the court below reasoned that the principle in *Good* "applies with equal force here." Pet. App. 13a.

The court below observed that, like the property in *Good*, McQueen's land had been subject to "at least some developmental regulation for over a century." *Id.* (citing The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994)). It next opined that "[t]his pre-existing permit requirement is relevant to respondent's investment-backed expectations." *Id.* (citation omitted). The court then drew the conclusion that McQueen's claim failed the second prong of the *Loveladies Harbor* test. "His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.*

McQueen filed a petition for rehearing, which the South Carolina Supreme Court denied on May 24, 2000. *Id.* at 49a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A SPLIT OF AUTHORITY AMONG THE LOWER COURTS

The decision below creates a deep national split of authority, which includes at least seven U.S. Courts of Appeals and state courts of last resort. Including the decision below, this conflict involves decisions of the U.S. Courts of Appeals for the Federal Circuit,[6]

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[6] The Federal Circuit is mired in internal conflict over the question presented. *Compare Good* v. *United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) *with Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000). Because *Palm Beach Isles* is the more recent case, it appears that the court is leaning in favor of McQueen's position. Moreover, the conflict we have described cannot be vitiated by the Federal Circuit acting alone.

(continued...)

the Eighth Circuit, and the Ninth Circuit, as well as the highest courts of Colorado, Massachusetts, Ohio, and South Carolina. Such a conflict particularly merits certiorari. Sup. Ct. R. 10(b).

The court below held that an owner does not suffer a compensable taking if he proves that a regulation deprives him of all economically beneficial use of his property, unless he also proves that the regulation frustrates his distinct investment-backed expectations. Pet. App. 10a. This holding accords with the decisions of at least three other courts.

In *Good* v. *United States*, 189 F.3d 1355 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit held that a property owner suffered no taking when the U.S. Army Corps of Engineers denied a permit to dredge and fill property located in the Florida Keys. *Id.* at 1363. To reach that conclusion, the court rejected Good's argument that *Lucas* had "eliminated the requirement for reasonable, investment-backed expectations, at least in cases where the challenged regulation eliminates virtually all of the economic value of the landowner's property." *Id.* at 1361. Instead, the court found that Good had not suffered a taking on the ground that he lacked investment-backed expectations in developing his property. The court reasoned that "the regulatory climate" put Good on notice that "either state or federal regulations could ultimately prevent him from building on his property." Yet Good "took no steps to obtain the required regulatory approval for seven years." *Id.* at 1362. Accordingly, the Federal Circuit held that Good's "lack of reasonable,

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[6] (...continued)
Any decision it reaches will leave at least seven decisions in conflict. And no decision by a single federal circuit can ultimately resolve a conflict that, as here, turns on the proper interpretation of this Court's case law.

investment-backed expectations defeats his takings claim as a matter of law." *Id.* at 1363.

In *Outdoor Graphics, Inc.* v. *City of Burlington*, 103 F.3d 690 (8th Cir. 1996), the U.S. Court of Appeals for the Eighth Circuit addressed whether a municipal ordinance mandating the removal of billboards from residential neighborhoods gave rise to a taking. *Id.* at 692. The court reasoned that *Lucas* requires a property owner to demonstrate that the regulation disappointed his investment-backed expectations, "even if a regulation denies a landowner all economically productive use of the land." *Id.* at 694. The court found that Outdoor Graphics lacked reasonable investment-backed expectations, because it had "knowingly purchased property that had been subject to a nonconforming use for a prolonged period." *Id.* Given that finding, the court thought it unnecessary to "decide whether the regulation at issue completely destroyed the economic value of Outdoor's property." *Id.*

In *State of Colorado, Department of Health* v. *The Mill*, 887 P.2d 993 (Colo. 1994), the Supreme Court of Colorado addressed whether restrictions imposed by the Colorado Department of Health on The Mill's use of land contaminated with radioactive uranium tailings constituted a taking under *Lucas*. *Id.* at 999. The court agreed that the challenged uses of the property created no nuisance. *Id.* at 1002 n.9. Nonetheless, it held that the property restrictions did not constitute a taking for the single reason that the owner lacked reasonable expectations in using the property in the manner forbidden by the State. Indeed, the court found The Mill's lack of reasonable expectations "'so overwhelming' as to dispose of the taking issue for purposes of determining just compensation." *Id.* at 1002 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). As in *Outdoor Graphics*, once the court determined that

the owner lacked reasonable investment-backed expectations, it saw no need to address "whether CDH 'regulation' destroyed all economic value in the property." *Id.* at 1002 n.8. Its inquiry into the owner's "reasonable expectations" not only gave the court its sole reason for denying the regulatory taking claim under *Lucas*, but also a reason to avoid the key question under *Lucas*, namely whether the regulation was totally confiscatory.

Arrayed against *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below are four decisions holding that, under *Lucas*, an owner who proves that a regulation is totally confiscatory has suffered a taking. These decisions expressly hold that reasonable investment-backed expectations are irrelevant to deciding *Lucas* claims or simply find that the owner has suffered a taking without considering his reasonable investment-backed expectations.

In *Palm Beach Isles Associates* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000) (pending on petitions for rehearing and rehearing *en banc*), a group of investors challenged the U.S. Army Corps of Engineers' denial of a permit to dredge and fill 50-odd acres of wetlands and submerged land. *Id.* at 1377. The Federal Circuit began its analysis by quoting the same three-part test from *Loveladies Harbor* that the lower court relied on in this case. *Compare id.* at 1379 *with* Pet. App. 4a. In contrast with the decision below, the Federal Circuit underscored that not every part of the test applied to every regulatory takings claim. "[W]hen the analysis of prong (1) reveals that the regulatory imposition has deprived the owner of *all* economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under prong (3)," 208 F.3d at 1379, based on property or nuisance law. Applying this understanding of the law, the Federal Circuit ruled that "the facts are

uncontrovertible that the permit denial has the effect of denying the property owner *all* economically viable use of the property," *id.* at 1381, and that the United States lacked any defense under state property or nuisance law.[7] The court inferred that "the denial by the Corps of the permits constitutes a categorical taking." *Id.* The court then stated that "[s]ince there is a categorical taking of the 50.7 acres, the issue of [the claimant's] investment-backed expectations under prong (2) of the *Loveladies Harbor* analysis is *not applicable*." *Id.* (emphasis added). Thus the Federal Circuit expressly held that an owner need not prove that a regulation interferes with his reasonable investment-backed expectations if he has already proven that the regulation deprives him of all economically beneficial use of his property.

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds sub nom. City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), a property development company brought an action under 42 U.S.C. § 1983 against Monterey. 95 F.3d at 1425. The company asserted claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, alleging that the city had imposed a taking when it refused to allow multi-unit residential housing to be built on a 37-acre lot of ocean-front property. *Id.* Reviewing a denial of the city's motion for judgment notwithstanding the verdict, the Ninth Circuit considered whether "[t]he jury also could have found the City liable for a taking because it denied Del Monte all economically viable

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[7] The court remanded, however, to "determine whether the Government had bona fide navigational grounds for its permit denial." 208 F.3d at 1386. Only on such a showing, said the court, would the government "have sustained its defense under *Lucas*." *Id.* Otherwise, the government would owe compensation. *Id.*

use of its property." *Id.* at 1432. Emphasizing that "[w]here such a taking is absolute, no inquiry into the state's interests advanced in support of the regulation is required," *id.*, the court upheld the jury's verdict for the owner. *Id.* at 1434. Nowhere in its discussion of Del Monte's *Lucas* claim did the Ninth Circuit mention the phrase "investment-backed expectations," except in the following sentence: "The Supreme Court has suggested that where an owner is denied *only some* economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations." *Id.* at 1432 (emphasis added). Contrary to the court below, the Ninth Circuit held that an owner suffered a taking under *Lucas* without inquiring into the owner's reasonable or distinct investment-backed expectations.[8]

In *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Judicial Court faced a similar case, on remand from this Court "for further consideration in light of" *Lucas*. *Lopes* v. *Peabody*, 507 U.S. 981 (1993). At issue in *Lopes* was the validity under the Takings Clause of a municipal zoning ordinance that restricted construction of new buildings within a "wetlands conservancy district." 629 N.E.2d at 1313. The parties stipulated that the ordinance, as applied, left the owner "unable to use his land." *Id.* at 1314. But the court found that

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[8] Recently the Ninth Circuit confirmed its view that *Lucas* does not require a court to consider the owner's investment-backed expectations. In *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert denied*, 525 U.S. 923 (1998), the court described *Lucas* in the following way: "In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and *no balancing of other factors commonly analyzed in takings law—reasonable investment-backed expectations and legitimate government interests—would be necessary*." 136 F.3d at 1228 (emphasis added).

stipulation insufficient and remanded to determine "whether application of the ordinance has caused the Lopes land to have no economically beneficial use." *Id.* at 1315. The court held that the consequences of such a finding were clear: "If the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the *Lucas* opinion advises us that there is a categorical regulatory taking, unless under the land use law of the Commonwealth the proposed use would be a nuisance or otherwise impermissible." *Id.* at 1316. *Lopes* thus omitted any consideration of investment-backed expectations when determining whether the owner had suffered a categorical taking under *Lucas*.[9]

In *State ex rel. Pizza* v. *Rezcallah*, 702 N.E.2d 81 (Ohio 1998), the Ohio Supreme Court consolidated three cases where residents were arrested for felony violations of State drug laws and where, despite the owners' good faith efforts to prevent and stamp out such criminal activity, the State brought actions against them for maintaining a public nuisance. *Id.* at 85. At issue was a regulatory takings challenge to a statutory provision that required a court, on finding that a certain place posed a public nuisance, to issue an order "directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released." *Id.*

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[9] Not surprisingly, the *Lopes* court's close attention to *Lucas* was outcome-determinative. On remand the Land Court ruled that the zoning regulation had caused Lopes to suffer a temporary taking. *See Lopes* v. *City of Peabody*, 718 N.E.2d 846, 849 (Mass. 1999). That ruling was affirmed on appeal, when the Massachusetts Supreme Judicial Court held that Lopes could claim reimbursement of the real estate taxes paid during the period of the taking, given that "a compensable temporary regulatory taking took place from 1981 to 1995, and that there was no economically beneficial use of the property during that time." *Id.* at 851 (footnote omitted).

at 87 (quoting Ohio Rev. Code Ann. § 3767.06(A)). Relying on *Lucas*, the Ohio Supreme Court held that "padlocking an owner's property, effectively closing it against all uses for a year, is a taking, albeit temporary in nature," *id.* at 89, and that the statute's "mandatory closure provisions . . . violate the Takings Clause of the Fifth Amendment to the United States Constitution when imposed against an innocent owner." *Id.* at 93. Contrary to the decision below, the question of investment-backed expectations played no role in the court's analysis.

The conflict between *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below on one side and *Palm Beach Isles*, *Del Monte Dunes*, *Lopes*, and *Rezcallah* on the other is striking and genuine. In each case an owner brought a claim under the Takings Clause, alleging that he had suffered a categorical taking as defined in *Lucas* due to a restriction placed by the government on his use of real property. In one line of cases courts rejected categorical takings claims under *Lucas* solely because they concluded that the owner had failed to show that the regulation interfered with his distinct or reasonable investment-backed expectations. However, in the other line of cases courts upheld categorical taking claims, while either expressly finding investment-backed expectations irrelevant or omitting that inquiry from consideration altogether. McQueen would therefore be entitled to compensation under the rule followed in *Palm Beach Isles*, *Del Monte Dunes*, *Lopes*, and *Rezcallah* but not under the rule followed in *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below. This conflict includes federal circuits and state courts of last resort from around the country and decisions stretching from 1994 to 2000. Because it presents a deep national conflict of authority among the lower courts, the judgment below deserves this Court's review.

In addition to the out-and-out conflicts we have identified, review is warranted because the decision below typifies the confusion afflicting many lower courts over the correct interpretation and application of *Lucas*. For instance, several courts have interpreted *Lucas* to mean that an owner suffers a compensable regulatory taking *only* if he can show that the regulation deprives him of all economically beneficial use. *See, e.g.*, *Kudloff* v. *City of Billings*, 860 P.2d 140, 142 (Mont. 1993); *McFillan* v. *Berkeley County Planning Comm'n*, 438 S.E.2d 801, 809–10 (W. Va. 1993); *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 531–32 (Wis. 1996). Such confusion, standing alone, has prompted the Court to grant review before. *See, e.g.*, *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 146–47 (1999).

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S REGULATORY TAKINGS DECISIONS

A. *Lucas* v. *South Carolina Coastal Council*

Certiorari is also merited in this case because the decision below conflicts with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Sup. Ct. R. 10(c). Such a conflict has been the sole reason for granting review in regulatory takings cases. *See Dolan* v. *City of Tigard*, 512 U.S. 374, 383 (1994). Indeed, "[a] conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a *strong reason* for the granting of certiorari." Robert L. Stern, et al., Supreme Court Practice 208 (7th ed. 1993) (emphasis added).

The Court's holding in *Lucas* is clear. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically

antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Even Members of the Court who dissented from the majority's decision in *Lucas* expressed no doubt that this holding prescribes a categorical rule and a single, narrow exception. Justice Blackmun wrote, "From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle." *Id.* at 1046–47 (Blackmun, J., dissenting). Justice Stevens agreed. "Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights." *Id.* at 1063 (Stevens, J., dissenting). Neither majority nor dissenting opinions suggested, as the court below held, *see* Pet App. 10a, that an owner who proves that a regulation deprives him of all economically beneficial use of his property has not suffered a compensable taking, unless he can also show that the regulation frustrates his distinct or reasonable investment-backed expectations.

The conflict between the decision below and this Court's decision in *Lucas* is magnified, given this case's "remarkable similitude to *Lucas*." *Id.* at 24a. Like David Lucas, Sam McQueen bought two lots of residential property along the South Carolina coast. *See* 505 U.S. at 1006; Pet. App. 45a. Like Lucas, McQueen sought to use his property for single-family residences, just as his neighbors had done. *See* 505 U.S. at 1007; Pet. App. 37a. Like Lucas, McQueen's plans were stopped cold by a regulatory framework erected after he acquired the property. *See* 505 U.S. at 1007; Pet. App. 45a; R. 283, 316. Like Lucas, McQueen consequently suffered the loss of all economically beneficial use of his property. *See* 505 U.S. at 1007; Pet. App. 46a. And like Lucas, the

State has been unable to "identify background principles of nuisance and property law," 505 U.S. at 1031, that would sustain its regulatory action without compensation. *See Lucas* v. *South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992); Pet. App. 9a. With such close factual and legal similarities, the contrary decisions of the Court in *Lucas* and the court below present a direct conflict.

This conflict results from the lower court's reliance on the Federal Circuit's decisions in *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994) and *Good* v. *United States*, 189 F.3d 1355 (Fed. Cir. 1999). The court below chiefly took its bearings from *Loveladies Harbor* as the decision prescribing what "a property owner *must* establish" in every regulatory takings case. Pet. App. 4a (emphasis added). *Good*, on the other hand, served as the lower court's precedential support for its remarkable conclusion that a property owner who acquires property without notice of a regulatory prohibition nonetheless lacks investment-backed expectations in that property if he fails to promptly seek development permits when they become legally available. *See id.* at 10a–13a. Accordingly, the court below declared that "[w]hile *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here." *Id.* at 13a.

Relying on *Loveladies Harbor* and *Good* misled the court below into issuing a decision in direct conflict with *Lucas*. *Lucas* mandates compensation for confiscatory regulations, so long as the owner possessed the challenged use as part of his title, 505 U.S. at 1027; the decision below mandates compensation only when the owner can show reasonable or distinct investment-backed expectations, as well. Pet. App. 10a. Hence the lower court not only erred, but produced a decision utterly

irreconcilable with *Lucas*. If the surest test of an asserted conflict is whether a different court would have reached a contrary result given the same facts, that test is amply satisfied here. It is difficult to imagine the court that decided *Lucas* turning away Mr. McQueen empty-handed.

B. Other Regulatory Takings Decisions

The decision below is also inconsistent with other decisions by this Court interpreting the Takings Clause. Contrary to several of those decisions, the court below added "investment-backed expectations" to the categorical rule applied in *Lucas* and then gave that element sufficient power to defeat even a categorical takings claim founded on undisputed evidence that a regulation is totally confiscatory. Grafting "investment-backed expectations" onto the categorical takings rule of *Lucas* obliterates the distinction between categorical and "ad hoc" takings. In *Lucas*, the Court described two circumstances where categorical treatment is warranted, in contrast with the "essentially ad hoc, factual inquiries," *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978), that ordinarily characterize regulatory takings cases. One such circumstance is governed by "the traditional rule that a permanent physical occupation of property is a taking." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Another circumstance involves the "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Aside from these circumstances, judicial inquiry is guided by several factors, including but not limited to "the character of the governmental action," its "economic impact," and its interference with "distinct investment-backed expectations." *Penn Central*, 438 U.S. 104, 124 (1978). Importing "distinct investment-backed expectations" into *Lucas* transforms what was

a categorical rule into an uncertain hybrid of categorical and *ad hoc* elements. With that a key distinction around which the Court has built its Fifth Amendment jurisprudence is destroyed. But the lower court's decision not only adds a superfluous element to the *Lucas* test for confiscatory regulations, it gives that new element sufficient power to single-handedly defeat a total takings claim. This creates a new class of categorical *non*-takings, wholly at odds with this Court's Fifth Amendment precedent.

The judgment below also produces harsh and unjust results, which are inconsistent with this Court's settled understanding of the Constitution. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Here Mr. McQueen, alone among his neighbors, has been denied permits to put up bulkheads on his property. Pet. App. 2a, 37a. Not only do those permit denials render his property economically useless—by the government's own admission McQueen's land is now good for nothing but spawning shrimp and fish bait for the local ecosystem, *see* R. 146–47—but he must keep paying taxes on property now forced into public service. *See Lucas*, 505 U.S. at 1017. Because McQueen has been compelled to shoulder the burden of protecting coastal wetlands, purportedly for the good of the entire State, *see* S.C. Code Ann. § 48-39-30(A) (1993), the lower court rendered a judgment in conflict with this Court's precedent when it denied him compensation.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT ONLY THIS COURT CAN FINALLY RESOLVE

Review should also be granted because the question presented is a recurring issue of national importance that only this court can finally resolve. The importance of the issue has often been expressed as a reason for granting review in regulatory takings cases. *See, e.g.*, *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 519 (1998); *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 274 (1981); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 166 (1979); *United States* v. *Causby*, 328 U.S. 256, 258 (1946). In two recent regulatory takings cases where review was denied, Members of the Court wrote separately to say that they would have granted review because of the importance of the issues alone, even without any conflicting authority. *See Lambert* v. *City and County of San Francisco*, 120 S. Ct. 1549, 1552 (2000) (Scalia, J., joined by Kennedy and Thomas, J.J., dissenting from denial of *certiorari*); *Parking Assoc. of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of *certiorari*).

Not only is the question presented intrinsically important by virtue of its role in constitutional law, but it is significant because it can be expected to recur frequently. It could determine the outcome of every claim brought under *Lucas*. This forms a substantial body of litigation, as a representative sample of only the past year's reported case law suggests. *See, e.g.*, *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000); *Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Palazzolo* v. *Rhode Island*, 746 A.2d 707 (R.I. 2000); *District Intown*

Properties Ltd. Partnership v. *District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999); *Cooley* v. *United States*, 46 Fed. Cl. 538 (Fed. Cl. 2000); *Boise Cascade Corp.* v. *Oregon*, 991 P.2d 563 (Or. Ct. App. 1999); *City of Seattle* v. *McCoy*, 4 P.3d 159 (Wash. Ct. App. 2000). That categorical takings claims under *Lucas* are raised so frequently should come as no surprise. Regulatory takings cases in general are "among the most litigated and perplexing in current law," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

More importantly, such litigation-spawning perplexity arises in this case from a dispute over the correct interpretation and application of one of this Court's own decisions. Unlike novel issues of statutory or constitutional interpretation, where extended percolation in the lower courts may confer deliberative benefits, no such benefits accrue when, as here, the dispute turns on the proper meaning of this Court's decisional law. And even if percolation were thought desirable, nine years is ample time for lower courts to muddle through when the point in doubt is as fundamental as the question presented. Only this Court can put an end to the conflict and confusion that we have described.

IV. THIS CASE PRESENTS AN UNUSUALLY SUITABLE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Several reasons favor granting review in this case rather than awaiting another vehicle to resolve the question presented. Jurisdiction clearly lies with the Court and McQueen has standing to bring this action. No factual disputes or procedural doubts prevent the Court from squarely addressing the question presented, and a decision on the merits for McQueen would provide him complete relief.

No relevant factual disputes divide the parties at this stage of the proceedings. The South Carolina Supreme Court conceded as much when it wrote, "It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property." Pet. App. 4a (emphasis added). Under *Lucas*, a property owner who has proved that fact gets compensation, unless the government can mount a defense under "background principles of nuisance and property law." 505 U.S. at 1031. OCRM failed to do this when the lower court rejected its argument that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d. 201 (S.C. 1984) supplied such principles. Pet. App. 9a. Absent such factual disputes, this case presents a pure question of law.

This case labors under none of the technical disputes typical of regulatory takings cases. McQueen's claim is ripe. Given the Coastal Zone Management Appellate Panel's final order denying McQueen's permit applications, Pet. App. 46a, "there [is] no question here about how the 'regulations at issue [apply] to the particular land in question." *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985)). And no denominator problem, *see Lucas*, 505 U.S. at 1016 n.7, lurks in the background. The master-in-equity ruled that OCRM's permit denials affected the entire portion of each lot belonging to Mr. McQueen. Pet. App. 40a.

The judgment below is a final judgment that rests on a single ground of decision. *See* Pet. App. 13a–14a. Unless this Court intervenes, no further proceedings will be held in the South Carolina courts in this case. A judgment by this Court in favor of Mr. McQueen would offer him complete relief.

Finally, the decision below was no aberration. Already the lower court has relied on that decision

to deny a regulatory taking claim based on the owner's purported lack of distinct or reasonable investment-backed expectations. In *Westside Quik Shop, Inc.* v. *Stewart*, 2000 S.C. LEXIS 151 (S.C. June 21, 2000), the court cited the decision below for the proposition that "even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Id.* at *14. Given such swift and unmistakable reliance on the decision below for exactly the proposition contested by Mr. McQueen here, it is unlikely that that decision reflects anything other than the lower court's fixed determination to apply its understanding of *Lucas* at every available opportunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2000

APPENDIX

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Petitioner.

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity.

Opinion No. 25108

February 3, 2000, Heard
April 17, 2000, Filed

BURNETT, A.J.: Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are located on manmade,

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations,

as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen*, 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to Lucas. David Lucas purchased two

coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-250 *et. seq.* (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas*, 505 U.S. at 1006–07. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground—a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time of purchase." *Id.* We do not think this is a valid assumption.[2]

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property

(continued...)

Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

> Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031. We disagree.

In *Carter*, we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "an owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit

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[2] (...continued)
below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.*, 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman*, 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct. App. 1984) (citing *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

denial there was a valid exercise of the State's police power to prevent public harm. 281 S.C. at 204–05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (Wis. 1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas*. *See, e.g.*, Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1, 46 & n.260 (1995) (*Just* is a background principle), Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 Land & Water L. Rev. 425, 447 & n.138. (1993) (same);[3] *but see* Joseph L. Sax, *Property Rights & the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1440 (1993) (arguing the *Lucas* Court "repudiated the conclusion of *Just*"), Richard Ausness, *Regulatory Taking & Wetland Protection in the Post*-Lucas *Era*, 30 Land & Water L. Rev. 349, 403–04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the 'natural' character of their land.") (citing *Carter*, *inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n.2.

property law that survives *Lucas*.[4] Our opinion in the first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas* case. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter*."). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter*. *Id.* at n.4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists

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[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528, 534 (Wis. 1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "nothing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States*, 39 Fed. Cl. 81, 98 & n.30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059–60 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he thought *Just* fell into the exception carved out by the majority for background principles of state law.

by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just*, the United States Supreme Court repudiated the reasoning of *Just* in *Lucas*:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, *by requiring land to be left substantially in its natural state*—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018 (emphasis added). The *Lucas* decision made clear the State "must do more than proffer . . . the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."[6] *Lucas*, 505 U.S. at 1031. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas*. *McQueen*, 329 S.C. at 597, 496 S.E.2d at 648.

> B. Did respondent have distinct investment-backed expectations entitling him to compensation?

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[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202–04, 314 S.E.2d at 328–29.

[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed. 1990).

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), *Mibbs v. South Carolina Dep't of Revenue*, ___ S.C. ___, 524 S.E.2d 626 (1999). Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop. This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor*, 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor*. *Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first

permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla. Stat. Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard. *Id.* at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988

allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1358–59.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1359.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C. § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the

federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.* (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361–62. The court stated that "while [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While Good is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed expectations. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 75–76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land

he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we REVERSE.

TOAL, A.C.J., MOORE, WALLER, JJ., and Acting Justice R. Markley Dennis, Jr., concur.

COURT OF APPEALS OF SOUTH CAROLINA

Sam B. McQueen, Respondent

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Appellant.

Opinion No. 2779

December 2, 1997, Heard
January 12, 1998, Filed

As Corrected February 12, 1998.
Rehearing Denied March 19, 1998.

ANDERSON, J.: Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in part, reverse in part, and remand.

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(i)(b) (Supp. 1996).

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on man-made, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and

neighbors wrote to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1996), which provides that the creation of residential lots for private gain

is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C. Code Ann. § 48-39-180 (Supp. 1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner*, 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544 (1960)). "The substantial evidence standard . . . is the proper standard for review of actions by the Coastal Council." 276 S.C. at 523–24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia*, that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements . . . to act upon applications within 90 days of the filing." The master noted the

significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness, or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Whatever doesn't make any difference, doesn't matter."); *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant*, 319 S.C. 348, 461 S.E.2d 388; *Carter*, 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision based on salt-tolerant vegetation found growing on the lots, *e.g.*, *borrichia frutescens* and

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C. Code Ann. § 48-39-10(3) (Supp. 1996). "Coastal wetlands" means "those areas periodically inundated by saline waters and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C. Code Ann. § 48-39-10(G) (Supp. 1996).

spartina alterniflora, which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council*, infra: Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "to promote economic and social improvement of the citizens of this State" while "protecting the sensitive and fragile areas from inappropriate development and providing adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C. Code Ann. § 48-39-30(1) (Supp. 1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), wherein the Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 79 U.S. 457, 12 Wall. 457, 551, 20 L. Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago,* 99 U.S. 635, 642, 25 L. Ed. 336 (1879). *See also Gibson v. United States,* 166 U.S. 269, 275–276, 17 S. Ct. 578, 580, 41 L. Ed. 996 (1897). Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414–415, 43 S. Ct. at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared." *Id.*, at 415, 43 S. Ct. at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*
>
> Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of

the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S. Ct. 987, 990, 8 L. Ed. 2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins* [*v. City of Tiburon*], 447 U.S. [255] at 260[, 65 L. Ed. 2d 106, 100 S. Ct. 2138]; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S. Ct. 1232, 1247, 94 L. Ed. 2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264,

> 295–296, 101 S. Ct. 2352, 2370, 69 L. Ed. 2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S. at 260, 100 S. Ct. at 2141 (citations omitted) (emphasis added).

505 U.S. at 1014–16.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its *Lucas* opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas*.

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable

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[4] In *Carter*, the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas*:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413, 43 S. Ct. at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66–67, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow

> held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. [419] at 426, 102 S. Ct. [3164] at 3171[, 73 L. Ed. 2d 868]—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027–29.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas*, 505 U.S. at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen

wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred.

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficultly in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything with either lot, including park a boat on one. The only use of the land available to McQueen

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

after the permit denials the Council could show was "recreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina Highway Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth*, 124 F.3d 632 (4th Cir. 1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs. CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.): I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes. Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall. The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish." The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[1]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

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[1] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas*, 505 U.S. at 1006. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007. The United States Supreme Court held Lucas' ability to build on his property was contained in the "bundle of rights" he acquired when he first bought the property. *Id.* at 1027. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas*." It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their

property. However, McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright-line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas*, 505 U.S. at 1031. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031 (emphasis added). See also 106 Harv. L. Rev. 163 at 272–73 (1992). ("Regulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[2]

In *Lucas*, Justice Scalia quoted Lord Coke, who said, "what is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017 (quoting 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. Ed. 1812)). In 1994, the Federal Circuit of the United States Court of Appeals, interpreting *Lucas* in light of the entire history of

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[2] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *See also Property Myths, Judicial Activism, And The Lucas Case*, 23 Envtl. L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, *Lucas* is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "this lot, by the passage of *time* and *tides for* the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas*: "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031. However, the omitted phrase reads as follows: "Though changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor*. As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment." I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become so critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

Order of February 28, 1996

STATE OF SOUTH CAROLINA COUNTY OF HORRY	) IN THE COURT OF) COMMON PLEAS) FIFTEENTH JUDICIAL CIRCUIT) Case No. 94-CP-26-3154	
SAM B. MCQUEEN, Plaintiff,	)	
-VS-	)	FINAL ORDER
SOUTH CAROLINA COASTAL COUNCIL, n/k/a/ SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made canals and were created by fill. The lots are Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter

came before this Court on January 5, 1996, for review pursuant to § 48-39-180, *Code of Laws of South Carolina*. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the Unite States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean of Coastal Resource Management (hereinafter OCRM), for two permits, one for each

lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. § 48-39-150(c), *Code of Laws of South Carolina*. The testimony at the evidentiary hearing, however, reveals that Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2–24; page 23, lines 18–25; page 24, lines 1–2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2–5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted

that Mr. McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corps of Engineers, the S.C. Department of Health and Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue

and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sought review of the OCRM's action "de novo" pursuant to § 48-39-180, *Code of Laws of South Carolina*. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sought to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, § 48-39-30(c), *Code of Laws of South Carolina*, and § 48-39-180, *Code of Laws of South Carolina*, requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. *The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property under the Fifth and Fourteenth Amendments of the U.S. Constitution Requiring the Payment of Just Compensation.*

Plaintiff, Sam McQueen, is entitled to just compensation to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§ 48-39-30 and 48-39-180, *Code of Laws of South Carolina*. See *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. US 119 L. Ed. 2d 561 and rev'd US 120 L. Ed. 2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina*

Coastal Council (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992 decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of the common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, supra, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13–25; page 20, lines 1–6). Mr. Chinnis

confirmed this. (TR page 72, lines 23–25; page 73, lines 1–8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1–6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be paid to sustain it. The state may not transform private property into public property without compensation." *Lucas*, supra.

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963, before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been

able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that . . . the Act is taking nothing." *Lucas*, supra, p. 2902. Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, ___ S.C. ___, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could *not* uncover any such common law principle. *Lucas*, supra.

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property in 1987, after the 1977 Act, and the property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The

distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a three prong test for determining if there has been a regulatory taking.

> 1) If there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> 2) the property owner had distinct investment-backed expectations; and
>
> 3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision

to seek a permit is insufficient to conclude that the property owner had no investment-backed expectations. In addition, the Defendant failed to submit any evidence to support this argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, lines 11–13). The law is clear that a property owner can offer testimony as to the value of his property. The OCRM did not offer any testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under

the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, the OCRM did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the Plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) I find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as set forth in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436,

motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his

applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this Order.

AND IT IS SO ORDERED.

s/ John L. Breeden, Jr.
Master In Equity

Dated: February 28, 1996
Conway, South Carolina

THE SUPREME COURT OF SOUTH CAROLINA

May 24, 2000

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Petitioner.

On Writ of Certiorari to The Court of Appeals

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity.

Opinion No. 25108

Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

Supreme Court, U.S.
FILED
OCT 19 2000
CLERK

(2)

No. 00-285

In the

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that the Takings Clause of the Fifth Amendment to the United States Constitution prescribes the following rule: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (footnote omitted).

The question presented is whether an owner has suffered a taking when he proves that a regulation deprives him of all economically beneficial use of his property without also proving that it frustrates his distinct or reasonable investment-backed expectations.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Pacific Legal Foundation attorneys have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 99-2047, 2000 U.S. LEXIS 6596 (Oct. 10, 2000), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation attorneys have represented two clients in two petitions for writ of certiorari in cases that involved analogous issues to the one at bar. *See Kim v. City of New York*, 681 N.E.2d 312 (N.Y.), *cert. denied*, 522 U.S. 1008 (1997); *City of Virginia Beach v. Bell*, 498 S.E.2d 414 (Va.), *cert. denied*, 119 S. Ct. 73 (1998). PLF has also filed amicus curiae briefs in support of petitioners in other cases that have been submitted to this Court with issues identical to the present ones. *See, e.g., Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999), and *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000). Because of the

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Sam McQueen bought two noncontiguous residential lots in 1961 and 1963. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), reproduced in Appellant's Appendix (AA) at 1a. Both lots are adjacent to manmade canals that were carved out to make a residential lagoon-style community. *See id.* at 1a-2a. In the early 1960's, the state had no restrictions against constructing bulkheads and filling such lots for residential development. *See McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 649 (S.C. Ct. App. 1998), reproduced in AA at 26a. Like many owners of undeveloped property, McQueen was in no immediate hurry to develop either lot. In 1977, the State adopted its Coastal Zone Management Act. 496 S.E.2d at 648-49, AA at 26a. That statute made it unlawful to develop properties such as McQueen's without applying for and receiving permits. *See* S.C. Code Ann. § 48-39-30(1), *et seq*. Nothing in the statute establishes time limitations for the development of real property affected by the new law. McQueen continued to bide his time. Finally, in 1991, he applied for permits to develop his property. AA at 2a. After various procedural steps not relevant to the present dispute, McQueen's applications and administrative appeals were ultimately denied in 1994. AA at 2a and 17a. He sued for a regulatory taking and prevailed in the Court of Appeals. AA at 29a. The South Carolina Coastal Council appealed.

Mirroring the facts in *Lucas*, the South Carolina Supreme Court began by holding unequivocally that "[i]t is uncontested

the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* at 4a. Yet the court found there had been no taking because of its curious take on the doctrine of investment-backed expectations.

The Court of Appeal found that McQueen had investment-backed expectations to develop the properties in the early 1960's when he purchased the property. AA at 26a (the ability to develop was an "expectation he clearly had when he purchased the lots over 30 years ago"). This finding was not contradicted by the South Carolina Supreme Court. But, according to the supreme court, these expectations apparently vanished. The court found that McQueen was not quick enough—he had waited too long to develop his property. He waited too long after he bought it (knowing that the Rivers and Harbors Act gave the federal government regulatory jurisdiction) and then he waited too long after the Coastal Zone Management Act was passed. AA at 13a. In the words of the South Carolina Supreme Court, "[h]is prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.* Thus, despite there being a total wipeout of "all economically viable use of his property," and despite the relegation, perhaps forever, of his property to its natural state, the court found that Sam McQueen's property has not been taken.

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

This Court has held on numerous occasions that if a regulation goes "too far" and destroys the economically beneficial and productive use of private property, then just compensation must be paid. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-16 (1992).

These holdings have not been met with universal acclaim. For example, a Washington State Supreme Court justice recently referred to this Court's opinion in *Lucas* as "superactive."[2]

Most lower federal and state court judges and justices are, of course, more circumspect. Their reluctance to trench upon the prerogatives of the regulatory state is manifested by attempts to distinguish, distort, and evade the key holdings of this Court, rather than the more visceral attack employed by Justice Talmadge. And, of course, not all lower courts react the same way. Rather than resist, some have embraced this Court's holdings that limit government's ability to destroy the use and value of private property through regulation without the payment of just compensation. But in many instances, the lower courts are all too willing to acquiesce to assertions of unchecked regulatory power over private property. The means by which the courts most frequently affirm government's power to take without compensation is by redefining the nature of the property. After all, if the property does not exist, how could it be taken?

The court below suggests that McQueen lost his investment-backed expectations because he did not try to develop quickly enough. This loss of expectations, in turn, results in a loss of the right to develop the property. Thus, the fundamental right to put property to economically beneficial and productive use has been transformed into a privilege with exceedingly short deadlines established by the state and the court. As will be shown, such a cavalier redefinition of background principles of property is inconsistent with the holdings of this and other courts. Indeed, as will be discussed

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[2] The justice continued by citing with favor a description of that opinion's author as a "judicial imperialist." Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 858 (2000).

below, conflicts now abound in the state and federal courts over the degree to which regulations can alter fundamental understandings of private property. Review by this Court is the only means to fix this doctrinal malady.

II

PROPERTY RIGHTS DO NOT DEVOLVE TO THE GOVERNMENT MERELY BECAUSE TIME PASSES AFTER A REGULATION IS ADOPTED

Underlying the decision of the South Carolina court is the thesis that property is a highly mutable concept. Under this theory, the background principles of property transform with time. Initially, an owner has the right to put the property to an economically beneficial and productive use. But after a regulation is adopted, the right to utilize property in a way that is affected by the regulation gradually diminishes with each passing day until the right at last disappears altogether. In other words, the longer one waits to develop property after a regulation is adopted, the less of a property right to develop remains.[3]

Here, for example, the restriction derives from the adoption in 1977 of the Coastal Zone Management Act. The Act did not directly remove development rights from the property owner—but the statute made those rights subject to a permitting requirement. The imposition of a permitting requirement by itself is not a taking and it would be pointless for an owner to bring an inverse condemnation claim just because he is now required to obtain a permit. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

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[3] According to this conceptual framework, the diminishment of property can also be accelerated when a regulated property is sold to a third party. *See, e.g., City of Virginia Beach v. Bell*, 498 S.E.2d 414; *Kim v. City of New York*, 681 N.E.2d 312.

Many, if not most, owners of undeveloped property do not intend to develop their land immediately. Personal reasons and market conditions may militate that an owner not develop an undeveloped parcel for years, or even generations, after it is first purchased. And until recent decisions such as *McQueen* came around, the property right itself was not altered merely by the delay. If an owner had a right to put property to economically beneficial and productive use ***before*** a regulation was adopted, the owner had similar rights ***after*** a regulation was adopted, albeit a right burdened by new permitting requirements. An owner could recover just compensation if the owner could prove in a timely facial or as-applied challenge that a regulatory taking had occurred.

But according to the court below, this is no longer true. The longer an owner waits to put property to use after a regulation is adopted, the less of a property right there is to defend. The court below couched this result in terms of Mr. McQueen's "investment-backed expectations," suggesting that those expectations disappeared because of McQueen's delay in development. That analysis is lacking. If McQueen had a legitimate expectation to develop his property prior to 1977, but not in 1991 when he applied for permits, then where did his expectations go and precisely when did they go? The court surely is not suggesting that his expectations disappeared the moment the statute was adopted in 1977. The idea that all expectations and rights disappear immediately after the regulation was adopted would preclude all regulatory takings challenges the moment a statute or regulation is adopted. That, of course, is not the law. *See Riverside Bayview Homes*, 474 U.S. at 127. So did McQueen's expectations and rights disappear one year later? Two years? Or perhaps just gradually, a little bit each year until there was nothing left in 1991? Such conclusions would be equally dissatisfying.

If, instead of focusing on the history of McQueen's expectations, one focuses on where the development rights have

gone, it is clear that they now belong to the government. Rights in property do not disappear into the air. They can be devised, sold, or stolen, but they do not evaporate. McQueen clearly no longer has a right to develop. There are no third parties with this right. There is no entity left other than the government that could possibly "own" the development rights. One would think McQueen is entitled to some sort of compensation. After all, the taking of his development rights has deprived McQueen of ***all*** economically beneficial and productive use of the property. AA at 4a.

But since a takings claim does not ripen until a permit application has been applied for and denied, and since McQueen had no "expectations" by the time he applied for his permits, the right to recover takings damages has disappeared before the case has even ripened! Mr. McQueen's alleged lack of "investment-backed expectations" is simply the court's creative ***mechanism*** that describes how McQueen has lost his development rights. But the ***result*** of the court's decision is a rule that interests in property are transferred merely through the passage of time after a regulation is adopted. The "bundle of sticks" that make up property is split into pieces: those interests that are restricted by the regulation devolve to the government with the passage of time. The owner keeps whatever is left. This alteration of the property, of course, may not be apparent until permit applications are denied and a court rules that the owner lacks investment-backed expectations because he did not attempt to develop quickly enough. In the end, the government will have obtained the development rights for free.

What exactly does this imply? Simply that anyone owning property today has no right to bring a regulatory takings claim over the application of whatever regulations have been in existence for a few or more years. The idea that property rights are fundamental liberties inherently owned by individuals must perish; rights in property must instead be viewed as mere trifles

or licenses, given by the government to the people at the discretion of the government.

Under this view, the old notion that property is an individually owned right disappears with the adoption of regulations. As soon as a regulation is adopted, or at least as soon as a few years pass, the right to use the property in a way that is subject to the new regulation will be owned by the government. Sometimes, the government may grant a permit application, thereby giving an "owner" the "vested right" or, more accurately, the "benefit" or "privilege" to develop property; other times, the government may deny permission. And because the government holds the development rights, and especially because the putative owner of the property should have known this and should have no contrary "expectations," there can be no complaint for just compensation.

The ruling below renders the Takings Clause of the Fifth Amendment nugatory. The debate is not new between those who have theorized that rights derive from the state and those who suggest that rights are inherently possessed by individuals. Nevertheless, the adoption of the former theory by an increasing number of courts in the context of environmental regulation should trouble this Court. The remainder of this brief will demonstrate that the theory of the South Carolina Supreme Court's opinion is contrary to the history and structure of the Constitution, the opinions of this Court, and the opinions of other lower courts.

A. The History and Structure of the Constitution Are Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

John Locke wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up

certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.
>
> The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.

John Locke, *Two Treatises of Government*, The Second Treatise §§ 123 and 124 (Peter Laslett ed., 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See, e.g.*, Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 Univ. of Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal Constitution).

The structure of the originally ratified Constitution was designed to protect property from, among other things, popular

agitation for "an abolition of debts, for an equal division of property, or for any other improper or wicked project." The Federalist No. 10 (James Madison) (Bantam ed., 1982). Later, the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed those development rights which the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption of a regulation followed by an indeterminate passage of time during which the owner does not seek to exercise his rapidly vanishing development rights.

Such a method for government acquisition of property is inconsistent with the Framers' vision of the relationship between property owners and their government. The Framers contemplated only one way by which the federal government could acquire private property against the will of the owner—through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27. Only this Court can restore the balance.

B. The Opinion of the South Carolina Court, That Government Can Acquire Development Rights in Property Merely by Adopting Regulations and Waiting for Regulation of That Land to Age, Is Contrary to Opinions of this Court

1. This Court Has Enforced Constitutional Limitations on the Ability of Governments to Take Property Without Compensation

In its early years, this Court came down strongly against uncompensated usurpations of private property by government. In *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court examined

Georgia's attempt to reacquire the title to millions of acres of land that had been purchased by good faith purchasers from others who had acquired the land from Georgia through corruption. Justice Marshall found the "act of transferring the property of an individual to the public" was both oppressive and a violation of the Contracts Clause. Georgia could not "pass[] a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." 10 U.S. at 139. In *Terrett v. Taylor*, 13 U.S. 43, 50-51 (1815), Justice Story wrote that Virginia's attempt to take property of the Episcopal Church was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property regally acquired."

Amicus submits that South Carolina cannot do indirectly what Georgia and Virginia could not do directly.

2. This Court Has Not Countenanced Government Defining Property Anew in Order to Take It; Events Occurring After a Regulation Is Adopted, Such as the Passage of Time or Sale of the Property, Do Not Redefine the Property

In more modern times, this Court has again returned to the understanding that government cannot alter the meaning of property in order to divest it from private owners. In *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist in the first place is no different from the court below holding that the development rights in McQueen's property vanished (or were divested to the state government) upon the mere passage of time following the adoption of regulations.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014, this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This implies the existence of principles that do not mysteriously change every time newly regulated property is not developed immediately after the adoption of a regulation.

Responding to an analogous syllogism, this Court made plain the fallacy of the South Carolina Supreme Court's logic in *Nollan v. California Coastal Commission*, 483 U.S. 825, where this Court wrote:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission *could not have deprived the prior owners of the easement without compensating them*, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2 (emphasis added). In this case, of course, we are not confronted with a landowner who purchased his land *after* the adoption of regulations, but with a landowner who acquired his land over a decade *before* the regulations were adopted. His only "mistake" was not establishing a record of "investment-backed expectations" by attempting to develop his property immediately after the purchase, or at least immediately after the adoption of the regulation.

The opinion of the court below strays from the principle that government cannot rewrite the definition of property in order to suit its own needs. In short, the adoption of a land-use or environmental regulation cannot destroy the right to use or develop property without compensation whether or not a landowner decides to exercise immediately that right to use or develop. This Court should grant certiorari in order to ensure that the lower courts no longer countenance the alteration of "background principles" through a post-regulatory passage of time.

3. The Doctrine of Investment-Backed Expectations Does Not Grant Government License to Take Riparian Property

The court below did not *overtly* say that it was redefining the nature of recently regulated property with every passing moment that an owner does not attempt to develop. As noted earlier, the court couched its holding in terms of Mr. McQueen's "reasonable investment-backed expectations." The concept of "investment-backed expectations" was first articulated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of distinct investment-backed expectations is one factor that a court may look to in determining whether there has been a regulatory taking.[4] This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Michelman cautions that expectations are not the exclusive way of defining property, for he later said that there

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[4] As noted in McQueen's petition, the relevance of this test where all economically visible use has been destroyed is questionable in light of this Court's holding in *Lucas*, 505 U.S. at 1016-17.

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman believes there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of riparian owners were protected ***despite*** expectations. *Id.* The Corps of Engineers could no more take Kaiser-Aetna's property without paying for it then South Carolina can take Sam McQueen's.

III

THERE IS A CONFLICT AMONG THE LOWER COURTS OVER THE DEGREE TO WHICH BACKGROUND PRINCIPLES OF PROPERTY LAW ARE AFFECTED BY EVENTS FOLLOWING THE ADOPTION OF REGULATIONS

As noted previously, this Court in *Lucas* said that courts must look first at "background principles" in order to determine what, if any, limitations exist on the development of real property that may obviate a finding of a regulatory taking. 505 U.S. at 1029.

A critical question, therefore, is whether the adoption of a regulation affects underlying "background principles." As one federal court wrote, the most important question in a regulatory takings inquiry is "what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?" *Reahard v. Lee County*, 968 F.2d 1131, 1336 (11th Cir. 1992). Although this Court in *Lucas* said that a limitation cannot be "newly legislated or decreed," the lower court in Mr. McQueen's case implicitly utilized the existence of the newly legislated Coastal Zone Management Act as a tool to undermine the existence of McQueen's "investment-backed expectations," which in turn serves to support the holding that McQueen did not have, or at least recently lost, the right to develop his property. In other words, the newly decreed legislation set in motion a change in the underlying property right of Mr. McQueen. Here, the change causes any development rights that are subject to the regulation to diminish incrementally in time after a regulation is adopted until, as here, they finally disappear altogether. The change is effected by the "failure to seek development permits in the face of ever more stringent regulations." AA at 13a.

Few courts have reached the question of how long a regulation must be in place, and how long a landowner can wait before seeking a development permit, before the regulation itself becomes a background principle capable of destroying investment-backed expectations and development rights.

A number of courts, however, have examined what happens when regulated property is transferred to a new owner. These courts are badly split. Some maintain that the background principles and development rights affected by the regulation remain intact and that they pass to the new owner. Others have found that the new owner does not acquire any development right that is subject to a preexisting regulation and that the new owner cannot maintain an inverse condemnation claim for the lost development rights. In such cases, the

background principles have been altered in that the development right has presumably passed to the government for free, much like what happened here from the passage of time.

Certainly, this is an issue of interest to this Court as demonstrated by the recent grant of a writ of certiorari in *Palazzolo*. There the Rhode Island Supreme Court denied a takings claim in part because the owner acquired the property (from a corporation in which he was the sole shareholder) after regulations were adopted. Likewise, several other states have adopted the rule that a sale to a third party after a regulation is enacted causes the transfer of the development right to the government. These states include New York, *see, e.g., Kim v. City of New York*, 681 N.E.2d 312; Virginia, *see City of Virginia Beach v. Bell*, 498 S.E.2d 414; Iowa, *see Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995); and New Hampshire, *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287 (N.H. 1984).[5]

But other states and the Ninth Circuit have rejected this rule. For example, New Jersey held in *Karam v. New Jersey, Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d

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[5] Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). Professor Eagle suggests that the right to bring an inverse condemnation claim must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes.

Id. at 368. In the case of *McQueen*, this warning can be expanded so that the "personal right has to be exercised *immediately after a regulation is adopted* . . . or else vanishes."

943 (N.J. 1999), that the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge. The Ninth Circuit in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), found that an as-applied takings challenge can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 118 S. Ct. 1359 (1999), the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In Florida, the court in *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *reh'g denied*, 613 So. 2d 3 (Fla. 1992), held that even though Vatalaro acquired property after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the state denied Vatalaro's permit application when the state determined her property was suitable only for limited passive recreational use. *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor."). Only this Court can resolve this conflict.

IV

THERE IS CONFLICT AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER A TAKINGS CLAIM FAILS DUE TO A LANDOWNER'S DELAY IN DEVELOPMENT ACTIVITIES

The South Carolina court found that McQueen's "failure to seek development permits in the face of ever more stringent regulations demonstrate[s] a distinct lack of investment-backed

expectations." AA at 13a. This logic is in conflict with a 1979 opinion by the California Supreme Court that found that a cause of action did not wane simply because a landowner waits to develop. In *Furey v. City of Sacramento*, 598 P.2d 844 (Cal.), *cert. denied and appeal dismissed sub nom. Webber v. City of Sacramento*, 444 U.S. 976 (1979), plaintiff landowners had their properties assessed for sewer infrastructure improvements in anticipation of the transition of the land from agriculture to urban development. However, eight years after they began to pay these substantial assessments, their land was rezoned to "open space." 598 P.2d at 846-47. Plaintiffs sued for inverse condemnation, among other causes of action. 598 P.2d at 848. In response to arguments that the landowners should not have waited to develop their property after the assessment was made, the California court held:

> Nor do we believe that plaintiffs' failure to develop their properties in the years intervening between the improvement and assessment and City's passage of its open-space limitation should be held to bar present complaint by them. . . . [There were allegations] to the effect that sound business decisions based upon housing demand and other relevant factors precluded development . . . .

Id. at 853.[6]

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[6] The idea that landowners should not be at a disadvantage because they bide their time to develop a property is also consistent with the holding of the many state courts that have modified or rejected the "coming to the nuisance" defense. *See, e.g., Weida v. Ferry*, 493 A.2d 824, 828 (R.I. 1985) ("The doctrine has been modified so that one's coming to the nuisance no longer acts as an absolute bar to recovering damages in a nuisance action. This modification came from a recognition that an absolute bar to a finding of nuisance would, in effect, give the offending activity a perpetual servitude upon the land of its neighbors without the payment of any

(continued...)

Similarly, Mr. McQueen's cause of action should not be held barred by his decision not to develop his lots when the Coastal Zone Management Act was adopted.

V

THERE IS A CONFLICT BETWEEN THE COURT BELOW AND THE FEDERAL CIRCUIT ON THE RELEVANCE OF CORPS JURISDICTION

The South Carolina court also ascribed importance to the fact that "[r]espondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899." AA at 13a. But the Federal Circuit has expressly rejected the invocation of the Rivers and Harbors Act as a means for the Corps to evade liability for a regulatory taking. In *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Corps denied a wetlands dredge and fill permit. When the landowner sued for inverse condemnation, the Corps argued that the landowner had no right to complain because the United States owns a superior "navigational servitude" over Palm Beach Isle's wetlands which it protects through the 1899 Act. However, the Federal Circuit held that the Corps could not avoid takings liability if the plaintiff's permit had been denied for *environmental* reasons, rather than out of a need to protect or improve *navigation*. *Id.* at 1385-86. The court did not find that the mere existence of the navigational servitude or the Rivers and Harbors Act of 1899 defeated the landowner's

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[6] (...continued)
compensation."); *Kellogg v. Viola*, 227 N.W.2d 55 (Wis. 1975); ("While coming to the nuisance may properly be considered while weighing the equities in an abatement action, it is irrelevant in a damage suit."); *Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I*, 445 S.E.2d 630 (S.C. 1994) (same). Here the "perpetual servitude" is the de facto acquisition of the development rights by the state.

"investment-backed expectations." *Id.* But here, the South Carolina Supreme Court opined that the mere existence of the Corps' unexercised regulatory jurisdiction pursuant to the Rivers and Harbors Act was enough to militate against finding a regulatory taking of McQueen's property. The opinions of the Federal Circuit and the South Carolina court are irreconcilable.

CONCLUSION

Sam McQueen lost all use and value of his property, and will not be compensated for that loss, because he did not attempt to develop his property immediately after the South Carolina Coastal Zone Management Act was adopted. This rule is contrary to the United States Constitution, opinions of this Court, and the holdings of other inferior tribunals. It represents, however, a trend that has been adopted in five states and that poses the most significant threat to well-established understandings of the place of property rights in this Nation. Just as this Court did in *Palazzolo*, it is respectfully submitted that this Court grant the petition for writ of certiorari.

DATED: October, 2000.

Respectfully submitted,

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SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Defenders was founded as a non-profit legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Bennett v. Spear*, 520 U.S. 154 (1997), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), when they were before this Court.

[1] No counsel for either party authored this brief amicus curiae, either in whole or in part. Furthermore, no persons other than amicus curiae contributed financially to the preparation of this brief.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In 1961 and 1963 respectively, petitioner purchased two building lots in North Myrtle Beach in South Carolina. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 629 (S.C. 2000). Both lots are located on man-made, saltwater canals and were created by fill. *Id.* at 630. At the time petitioner purchased his lots, there were no environmental or other zoning restrictions that would have precluded him from building a bulkhead on his lot to protect his property from erosion. Indeed, most of his neighbors constructed houses and bulkheads on their lots during that time period. *Id.*

In 1977, however, the South Carolina Coastal Council promulgated regulations requiring that an owner obtain a permit prior to constructing a bulkhead on the lots and further providing that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 2000).

In 1991, petitioner applied for a permit to construct a bulkhead on his property and for a permit for a 90-foot setback. *McQueen*, 530 S.E.2d at 630. Confusion on the part of the Army Corps of Engineers, which also participated in the permitting process, resulted in no action being taken on one of his permit applications for nearly two years, and petitioner was required to resubmit both permit applications in 1993. *Id.* The Coastal Council then denied the permits pursuant to Regulation 30-12(G)(2)(a). *Id.*

Having exhausted his administrative remedies, petitioner filed a lawsuit in state court seeking just compensation for the taking of his property rights pursuant to the Just Compensation Clause of the Fifth Amendment. *Id.* The trial court found that the property owner had been denied all economically viable use of his property and thus held that the Fifth Amendment had been violated and awarded $100,000 in damages. *Id.* The appellate court agreed holding that the petitioner had suffered a "textbook regulatory taking," but remanded the case on the issue of damages. *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. App. 1998).

The case was never remanded to the trial court, however, because the South Carolina Supreme Court agreed to review the merits of the liability decision. *McQueen*, 530 S.E.2d at 630. On review, the South Carolina Supreme Court converted the *Lucas* per se test into a three-factor test of which total deprivation of all economically productive and beneficial use of private property is but one factor to be considered by a court in determining liability under the Just Compensation Clause. *Id.* at 630-31. According to the court below, to prevail on a *Lucas*-type takings claim, a property owner must satisfy the following three-part test by establishing that:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> (2) the property owner had distinct investment-backed expectations; and,
>
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within

> the power of the state to regulate under common law nuisance.

Id.

The South Carolina Supreme Court held that petitioner lacked reasonable investment-backed expectations with respect to the use of his property because his property had "been the subject of at least some developmental regulation for over a century. . . . [and] [h]is . . . failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.* at 634-35.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE COURT BELOW'S INCLUSION OF "REASONABLE EXPECTATIONS" IN ITS TAKINGS ANALYSIS THREATENS THE PREDICTABILITY PROVIDED BY A DEFINITION OF PROPERTY RIGHTS GROUNDED IN MUTUAL UNDERSTANDINGS OF BACKGROUND PRINCIPLES OF STATE LAW AND THEREFORE WARRANTS REVIEW BY THIS COURT.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court's takings analysis reflected the need for predictability in the law regarding one's rights in property:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . We believe similar treatment must be

> accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id. at 1027, 1029.

The right to own and enjoy one's property is one of the fundamental rights on which our system of law and government rests and is a potent component of one's property estate. James Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment.

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional

requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

The requirement of a stable system of property rights for which the government's taking of private property triggers the duty to pay just compensation is reflected throughout takings jurisprudence. For example, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals held that "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1275 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (holding that property consists of recognized expectancies)).

In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that physical occupation of private property is a per se violation of the Fifth Amendment:

> [W]hen the "character of the governmental action," is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 433-35 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the taking of all beneficial and productive use of private property is tantamount to a

physical taking and thus is also a per se violation of the Just Compensation Clause:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the *historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.*

Lucas, 505 U.S. at 1028 (emphasis supplied); *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994) ("The recent Supreme Court decision in Lucas . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land – destroying its economic value for private ownership – the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.").

The court below, however, held that regulations adopted long after a building lot was purchased becomes part of the owner's expectations regarding the use of his property and destroys any constitutional right to just compensation if permission to use the property is later denied. *McQueen*, 530 S.E.2d at 633-35. The court below thus holds that a property owner's "understanding" of his rights in his property must change with every new permitting and regulatory requirement, which of course, is nothing less than the opposite of predictability. Indeed, what such a rule of law says, in essence, is that a property owner cannot rely on background principles of the State's law of property and nuisance, but must instead guess and

anticipate every change land use regulators may make with respect to his or her property rights.

That is not to say, however, that there is not an appropriate role for reasonable investment-backed expectations in takings analysis. The proper role of expectations in takings analysis was explained by Justice Brennan in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* Court held that where the owner has remaining use of his property, there is no set formula for determining whether the Fifth Amendment has been violated. *Id.* at 123. In such cases, expectations are to be examined along with a number of other factors because the question is whether the particular use denied (less than all use) was one that the owner could have reasonably expected. *Id.* at 124. Taking into account what the law allowed a property owner to do with his property at the time he purchased it also helps determine whether it would be unfair to deny the owner just compensation if later regulations forbid the proposed use. *Id.* There is nothing in the *Penn Central* decision, however, that even hints that government actions can vitiate a vested property right without incurring the constitutional obligation to pay just compensation or that holds that the expectations of a property owner must fluctuate with every regulatory land use change.

To the contrary, the *Penn Central* Court underscored the fact that just compensation would be required if the regulation caused economic harm and "interfere[d] with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945)

(holding that petitioner did not possess a property right but rather "a privilege or convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but not an interest protected by law . . .); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (holding that riparian owners of the shore and bed of the St. Mary's River had no right of private property in the water power); *Muhlker v. Harlem R. Co.*, 197 U.S. 544 (1905) (reversing decision dismissing complaint for just compensation for taking of recognized property rights)).

The final error the court below makes is in failing to recognize that the rule that just compensation is to be paid for a taking when no use of property is permitted also forms part of the owner's reasonable expectations regarding his property. If that constitutional requirement is part of the landowner's expectations, then no further inquiry into expectations is required and thus the court below erred in holding to the contrary.

II. THE EXISTING SPLIT AMONG LOWER COURTS ON THE ISSUE OF WHETHER A PROPERTY OWNER IS ENTITLED TO RELY ON BACKGROUND PRINCIPLES OF PROPERTY LAW FURTHER INDICATES THAT REVIEW BY THIS COURT IS WARRANTED.

The court below flatly rejected this Court's holding in *Lucas* even though the landowner was denied all beneficial and productive use of his land. *McQueen*, 530 S.E.2d at 629-30. According to the court below, petitioner is not entitled to just compensation because his beachfront property had been the subject of "some" developmental regulation for over a century. *Id.* at 630-35. The court

below concluded that the landowner had thus demonstrated a "distinct lack of investment-backed expectations" to warrant just compensation. *Id.* at 635.

The decision below is within one of the two distinct lines of cases that have developed following the *Lucas* decision. Consistent with *Lucas*, many courts have adopted a categorical rule of liability holding that when the property owner has been deprived of all beneficial and productive use of his property, liability for a taking has been established. The integrity of the *Lucas* per se rule was confirmed last term when this Court upheld a Ninth Circuit decision awarding just compensation for the taking of all economically viable use of the landowners' property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In *Del Monte Dunes*, the Ninth Circuit explained "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use.' " *Del Monte Dunes*, 95 F.3d 1422, 1432 (9th Cir. 1996); *see also Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("In Lucas, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of other factors commonly analyzed in takings law – reasonable investment backed expectations and legitimate government interest – would be necessary.").

In *Florida Rock Industries v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), the U.S. Court of Appeals for the Federal Circuit suggested that the *Lucas* per se test applies even when there is less than a total taking. In *Florida Rock*, there was a 95 percent

diminution of value. The *Florida Rock* Court stated further that in a takings case, the court must resolve two preliminary questions: "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking . . . to occur," and "how to determine, in any given case, what that proportion is." *Id.* at 1568; *see also Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000) ("[W]hen . . . the regulatory imposition has deprived the owner of all economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under . . . state property law . . . [or] . . . the common law nuisance doctrine.").

In *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996), the Vermont Supreme Court held that even though the property owner may not have had reasonable investment-backed expectations for use of his building after it had been destroyed by a fire, he could still be entitled to just compensation if he could show that all economically beneficial use of his land had also been destroyed: "[a]ny expectation of a three-unit residential development was no longer 'reasonable,' . . . only the total denial of all economically beneficial use would, under the circumstances, create a taking." *Id.* at 790 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992)).

Likewise, in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Court held that "[i]f the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the *Lucas* opinion advises us that there is a categorical regulatory taking. . . . " *Id.* at 1316. Finally, in *Ohio ex rel. Pizza v.*

Rezcallah, 702 N.E.2d 81, 93 (Ohio 1998), the Ohio Supreme Court held that the mandatory locking of a storehouse that precluded the owners from making any use of the storehouse for that period of time was a per se violation of the Just Compensation Clause.

In sharp contrast, numerous courts, including the court below, have not followed the *Lucas* rule and have held that even when a regulation deprives a property owner of all use of his property, the property owner must satisfy the reasonable, investment-backed expectations prong of the *Penn Central* test. The leading case for the establishment of the anti-*Lucas* rule, and relied on by the court below, is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). In *Good*, the U.S. Court of Appeals for the Federal Circuit held that the owner of 40 acres of undeveloped land in Florida was not entitled to just compensation for the taking of all beneficial and productive use of his property by virtue of his being denied a Section 404 permit. The Federal Circuit held that just compensation was not warranted in that case where because of "the growing consciousness of and sensitivity toward environmental issues," the landowner should have foreseen that "the regulatory climate" would bar any future use of his property, even though the landowner had acquired the land prior to enactment of the statute that barred his current proposed use. *Id.* at 1361, 1363; *see also Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (rejecting takings claim on the ground that the property owner knew that the regulatory program in place precluded use of the property).

The *Good* rule has been followed by three courts of last resort at the State level and the federal district court

for the District of Columbia. Not only has the Supreme Court of South Carolina followed the *Good* rule in this case, but it also followed it in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000), *petition for cert. filed* (Sept. 20, 2000).

In *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted* (Oct. 10, 2000), the landowner sought just compensation for the taking of his land from the Rhode Island Coastal Resources Management Council (CRMC). The Rhode Island Supreme Court held that the landowner was not entitled to just compensation because: "At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." *Id.* at 717. In *Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995), the Colorado Supreme Court held that there was no unconstitutional taking of the owners' property because the owners lacked a reasonable expectation that they could use the property in the manner they intended.

In *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied* (Oct. 2, 2000), the landowner sought just compensation for the taking of his land following denial of permits to construct townhouses in the District of Columbia. The United States District Court of the District of Columbia held that the landowner was not entitled to just compensation because "[the landowner] purchased and subdivided its property subject to an existing regulatory scheme that establishes that [the landowner] could have

had no reasonable expectations of development at the time it made its investments." *Id.* at 883.

Finally, in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1, 4 (S.C. June 21, 2000), *petition for cert. filed* (Sept. 20, 2000), owners of video gaming machines and video poker businesses in South Carolina sued for a taking when a legislative ban on video gaming machines was upheld by the court below, subjecting the property owners to forfeiture of their property, closure of their businesses and imposition of criminal punishment for engaging in an industry that had always been legal in the State of South Carolina. The court below held that the property owners should have anticipated that the video poker industry, because it was subject to some state regulation, could have been completely prohibited at some point in the future. *Id.* Thus, the court below held, in direct contravention of this Court's ruling in *Lucas*: "Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Id.*

CONCLUSION

For all of the foregoing reasons, *amicus curiae* urges this Court to grant the petition for a writ of certiorari. Failing that, in light of this Court's October 10, 2000 decision to grant review in *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted* (Oct. 10, 2000), a case which also raises the issue of the role of reasonable investment-backed expectations in a takings

analysis, *amicus curiae* urges this Court to stay its decision until a decision is rendered in that case.

Respectfully submitted,

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In The

Supreme Court of the United States

SAM B. McQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COMMISSION),

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of South Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO ENSURE THAT THEIR RIGHT TO RECEIVE JUST COMPENSATION IS NOT LOST THROUGH THE MERE PASSAGE OF TIME

The NAHB represents over 200,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar,

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[1] No counsel for either party authored any part of this brief. No person or entity other than the NAHB and the BILD Foundation made any monetary contribution to the preparation or submission of this brief.

governmental action which has deprived them of all viable economic use of their land is held immune from the remedy provided by the Just Compensation Clause merely because the landowner did not immediately begin development.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent member of the NAHB, whose 1,800 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

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[2] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

The NAHB and the BILD Foundation submit their amici curiae brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether a landowner who has not made use of his or her land for some period of time has effectively abandoned the land and is therefore not entitled to recover the Just Compensation required by the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, where governmental action deprives the landowner of all viable economic use.

SUMMARY OF THE ARGUMENT

Landowners may leave their land undeveloped for various lengths of time depending on their individual needs and desires. Governmental action can prohibit all economically beneficial use and leave the land with no value. Normally, this would result in a taking which would require the payment of the constitutionally mandated Just Compensation. The South Carolina Supreme Court has held that the mere passage of time can provide an absolute shield for that governmental action and relieve the government of paying Just Compensation.

The idea that landowners are exposed to a "use it or lose it" rule of law is both bad law and bad policy. It will force landowners to develop their land quickly because of the fear that delay may mean the loss of all economically beneficial use without the possibility of receiving Just Compensation.

It will force courts to spend precious judicial resources trying to figure out how long is too long. No

one – not the landowner nor the government – will know before trial is over and the appellate review process is finished whether the landowner waited too long or whether the government is liable for the payment of Just Compensation.

Black letter law may be simplistic but it does have its place and this is one of them. Everyone – landowners, government and, not least, courts – should know that the length of time between the purchase of land and its development is not relevant when governmental action has deprived the land of all economically beneficial use. A court is simply not justified in denying Just Compensation because the landowner waited before developing his or her land. Investment-backed expectations should not be defeated because of a landowner's desire or, in many cases, need to wait to begin development.

This Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), laid down a categorical rule that governmental action which deprives land of all economically beneficial use constitutes a taking for which constitutionally mandated Just Compensation must be paid. This Court's definitive statement whether the mere passage of time can strip landowners of their right to receive Just Compensation – whether the rule is to be that a landowner must either use the land or, for all practical purposes, lose it – is needed to ensure that all landowners in the United States know precisely what they must do – or need not do – in order to prevent governmental actions from depriving them of all economically beneficial use of their land without being required to provide the constitutionally mandated Just Compensation. If *Lucas's* categorical rule bears a use-by

date, this Court should tell us so which, in turn, requires that Mr. McQueen's petition for certiorari be granted.

ARGUMENT

I. THE RULE FOLLOWED BY THE SOUTH CAROLINA SUPREME COURT WILL DEPRIVE A SUBSTANTIAL NUMBER OF LANDOWNERS OF THEIR RIGHT TO JUST COMPENSATION IF IT IS ALLOWED TO STAND

Governmental action which deprives land of all economically beneficial use constitutes a taking of the land and the Constitution mandates that the government pay the landowner Just Compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The South Carolina Supreme Court's decision, if it is allowed to stand unreviewed, will, in all too many cases, override *Lucas* because land frequently remains undeveloped for some period of time before the landowner decides to develop it. Landowners come in all shapes and sizes so, not surprisingly, the delays between acquisition and development may be anywhere from days to centuries.

Individuals buy land for their own use. Sometimes they will act almost immediately after the purchase. *Bowles v. United States*, 31 Fed. Cl. 37 (1994)(purchase of a vacant lot for a retirement house and submission of an application for a § 404 permit under the Clean Water Act, 33 U.S.C. § 1344, in the same year). Sometimes they wait a few years. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)(two years between purchase and enactment of the Beachfront Management Act which

resulted in a taking), and *Erb v. Maryland Department of Environmental Protection*, 110 Md.App. 246, 676 A.2d 1017 (1996)(eight years between acquisition of family land, held since the 1920s, and application for a septic tank permit).

Some individuals have waited substantially longer before seeking to develop their land. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)(15 years between purchase of the land and submission of a development application for a single house). Mr. McQueen waited 30 years. (Pet. App. at 1a-2a.)

Developers of large projects also wait for varying lengths of time before beginning to develop their land although, the approval process being what it is, the time is generally a matter of several years at a minimum. *AVCO Community Developers, Inc. v. South Coast Regional Commisssion*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), *app. dismissed and cert. denied*, 429 U.S. 1083 (1977)(four years between purchase and enactment of the California Coastal Zone Conservation Act of 1972), *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct. 1554 (2000)(eight years between purchase of the land and application for a § 404 permit), and *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982)(nine years between purchase of the land and submission of a development application in a multiphase development).

Time measured in decades is not at all uncommon. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56 (1997)(18 years between purchase of the land and submission of a development application), *Loveladies*

Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)(24 years between purchase of the land and denial of § 404 permit in a multi phase development), and *Palm Beach Isles Associates v. United* States, 208 F.3d 1374 (Fed. Cir. 2000)(32 years between purchase of the land and application for state wetlands fill permit).

It is even possible for land to remain undeveloped for over a century before the landowner decides to develop it. Playa Vista, the largest development project in the City of Los Angeles, is currently being developed on land that was originally acquired by patent from the Spanish government in 1839. *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 202 (1984). Planning for development on the land did not even begin until 1979 and an application for a § 404 permit wasn't submitted until 1990. *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105, 1110-1111 (9th Cir. 2000).

Landowners change their mind from time to time as to what they wish to do with their land. The owners of what is now Malibu, a portion of Los Angeles County known through out the world as the home of the rich and famous, asked the County to open a public road through their property in 1885 but later changed their minds. *People v. Rindge*, 174 Cal. 743, 164 P. 633 (1917). Indeed, the owners fought to avoid having a road condemned over their land. *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923).

Clearly, the Rindges did not want to develop their land; it remained undeveloped, used only for ranching, for

half a century after Matthew Keller acquired it in 1882. *People v. Rindge, supra,* 174 Cal. At 746, 164 P. at 635.

The Mayhews bought 850 acres of land for ranching purposes between 1941 and 1965 and an additional 346 acres in 1985 and 1986 when they decided to develop a minimum of 3,600 houses. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999).

The Schweinerts bought land from New Jersey in 1924, sold off pieces over the years and, in 1993, sold off a piece to the Karams who immediately applied for a dock construction permit. *Karam v. State of New Jersey, Department of Environmental Protection*, 308 N.J. Super. 225, 705 A.2d 1221 (1998), *aff'd mem.*, 157 N.J. 187, 723 A.2d 943, *cert. denied*, 120 S.Ct. 51 (1999).

If the rule laid down by the South Carolina Supreme Court is a correct statement of the law, then the Rindges, the Mayhews and the Karams would all be denied Just Compensation simply because either they or their predecessors in interest had waited too long or, in the case of the Rindges and the Mayhews, had no investment backed expectations suitable for constitutional protection because they had used their land for other purposes and, government could argue, had abandoned any claim to more intensive use of their land. See, e.g., *State of Florida, Department of Environmental Protection v. Burgess,* 2000 WL 889840 (Fla.App. July 6, 2000)(no reasonable investment-backed expectation for change in use when landowner had used land for nature walks and fishing for 32 years before applying for a state wetland fill permit).

The common law, in California and generally, is that real property cannot be abandoned. *Gerhard v. Stephens*, 68 Cal.2d 864, 883, 69 Cal.Rptr. 612, 628, 442 P.2d 692, 708 (1968)("... many California cases have declared that a *fee simple* interest in *real property* may not be abandoned.")[italics in the original]. *See generally*, 11 *Thompson on Real Property*, § 91.07, *Title by Abandonment* at 23 (Thomas ed. 1994 and 2000 Cum. Supp.), and 1 *C.J.S.*, *Abandonment*, § 7.b, *Subjects of abandonment, Real property and rights or interests therein* at 14 (1985 and 2000 Cum. Annual Pocket Part).

The practical effect of the ruling by the South Carolina Supreme Court, if it is allowed to stand, will be equivalent to a rule of law that holds that a landowner has abandoned his or her land if development is not begun and rights vested before the law changes to the landowner's detriment. This would be a substantial change in the law, one which, if it is to become the law (and it should not), should come from this Court.

Title will presumably remain vested in landowners such as Mr. McQueen but what is bare title worth if no use is allowed and no Just Compensation must be paid? *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938)(the only difference between outright confiscation and an overly burdensome restriction on use "is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.").

Again, the practical effect will be an escheat to the State, something which, like abandonment, is disfavored by the common law in California and generally.

Mannheim v. Superior Court, 3 Cal.3d 678, 691, 91 Cal.Rptr. 585, 592, 478 P.2d 17, 24 (1970), and *United States v. 198.73 Acres of Land*, 800 F.2d 434, 435 (4th Cir. 1986).

The concerns expressed above are important for landowners throughout the United States but of even greater importance for those in California where the courts have come up with ways to avoid finding that a taking has occurred. See, e.g., *Landgate v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, *cert. denied*, 525 U.S. 876 (1999)(denial of all viable economic use resulting from a mistaken interpretation of the law cannot result in a taking).

II. CONCLUSION

The NAHB and the BILD Foundation respectfully request that this Court grant Mr. McQueen's petition for writ of certiorari.

DATED: October 20, 2000

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 23 2000
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(5)

No. 00-285

In The

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (formerly known as SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 23, 2000

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QUESTIONS PRESENTED

1. Whether a property owner's lack of reasonable, investment-backed expectations, as demonstrated by thirty years of neglect of his property, is dispositive of his regulatory takings claim?

2. Whether the South Carolina Supreme Court correctly held that the denial of Petitioner's permit applications to fill two wetland lots did not effect a taking of Petitioner's property?

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The opinion of the South Carolina Supreme Court is reported at 530 S.E.2d 628 (S. C. 2000) and reprinted in the Respondent's Appendix at 1. The opinion of the South Carolina Court of Appeals is reported at 496 S.E. 2d 643 (S. C. Ct. App. 1998) and reprinted in the Respondent's Appendix at 17. The final order of the South Carolina Court of Common Pleas is unreported and reprinted in the Respondent's Appendix at 39.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 17, 2000. A petition for rehearing was denied on May 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

Sam B. McQueen purchased two lots, located on man-made tidal canals, in an area known as Cherry Grove, in North Myrtle Beach, Horry County, South Carolina. McQueen purchased his lots in 1961 and 1963. These lots are located in a residential development created in the 1950's from a massive dredge and fill operation. Numerous finger canals were dredged out of salt marsh and the spoil material was used to create lots adjacent to these finger canals. R. 28. McQueen paid $2,500.00 in 1961 for the lot known as the 53rd Avenue lot and $1,700.00 in 1963 for the lot known as the 48th Avenue lot. R. 24.

Fifteen years after McQueen's initial purchase the S. C. Legislature adopted legislation generically known as the Coastal Zone Management Act. S. C. Code Ann. § 48-39-10 to -360 (1976 & Supp. 1999). That Act created the South Carolina Coastal Council, who promulgated regulations in 1977 for the management of coastal resources. These regulations prohibited the dredging, filling, or other alteration of tidal wetlands for commercial or residential development. 23A S. C. Code Ann. Regs. 30-1 to 30-21 (as amended in 1999).

McQueen was completely unaffected in 1977 by the adoption of these regulations. At the time of the adoption of these regulations McQueen's lots were entirely high ground, with an elevation and dimensions suitable for residential construction without alteration. McQueen could have constructed houses on these lots without seeking a permit from the regulatory agency.

However, the passage of time and the tidal cycle gradually affected McQueen's property.[1] The record before the S. C. Supreme Court included a report from a soil conservationist prepared for McQueen. According to this report the lot located on 48th Avenue began eroding between 1983 and 1989, and the lot on 53rd Avenue began eroding between 1974 and 1983. Importantly, this report indicates that surrounding, similarly situated property

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[1] The Honorable C. Connor, Judge, S. C. Ct. of Appeals, in her dissenting opinion, adopted the description of the agency's hearing officer. "Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, '[t]his lot, by the passage of time and tides for the past 30 years, has become unbuildable.' " Resp. App. 37.

owners began installing bulkheads to prevent erosion as early as 1968. R. 334.

The construction of a bulkhead is an allowable activity pursuant to S. C.'s coastal management scheme.[2] The purpose of a bulkhead is to stabilize a shoreline and to prevent erosion caused by the constant invasion of tidal flow. Tidal flow onto high ground reduces the elevation of the ground by gradually stripping away sediment. The bulkhead, usually constructed of timber, armors the shoreline and blocks tidal flow.

The adoption of S. C.'s coastal management regulatory scheme in 1977 did not limit McQueen's ability to use his property. Nor did it impair his ability to protect and preserve his property by constructing a bulkhead and armoring his lots. In fact, in the early 1980's, McQueen became aware of the need for a permit to erect a bulkhead on his property for erosion control, but abandoned his efforts after initial inquiries with the Coastal Council about the permitting process. R. 211.

McQueen's inaction over a thirty-year period resulted in the invasion of tidal waters well onto the boundaries of both of his lots. Both lots lost sediment, and elevation. Salt tolerant vegetation colonized on both

---

[2] *See* 23A S. C. Code Ann. Regs. 30-12(C) (1999).

lots. One lot developed the characteristics of an intertidal mudflat habitat. R. 161 and 167.[3], [4]

In 1991, when McQueen finally decided to develop these lots, the lots could no longer support residential construction without the addition of truckloads of fill material. Petitioner's description of the activity for which McQueen sought permission as a "bulkhead permit" (Pet. 3) is a calculated misnomer. When McQueen finally commenced the permit application process in 1991[5], he no longer sought the construction of bulkheads on both lots

---

[3] Respondent's biologist testified that the lot on 48th Avenue was densely vegetated with Borrichia and Spartina Patens, plants indicative of tidal wetland areas. The 53rd Avenue lot was, in part, devoid of vegetation but was filled with decaying marsh plants indicative of regular, frequent tidal flow.

[4] Petitioner claims that no other State or Federal agency objected to this application. In fact, the S. C. Wildlife and Marine Resources Department commented and expressed no objection "provided that the bulkhead is placed against the existing erosional scarp and landward of any wetland vegetation." R. 333. The construction proposed by McQueen violates this provision, since the bulkheads are proposed to be placed well seaward of wetland vegetation and habitat, and fill material will be utilized to destroy such vegetation and habitat.

[5] Petitioner discusses the history of McQueen's applications on page 3 of the Petition. Petitioner notes that the applications were made in 1991 and re-submitted in 1993. The handling of the 1991 applications, and the 1993 re-submittals, were not issues before the S. C. Court of Appeals and the Supreme Court. McQueen voluntarily dismissed his appeal of the 1991 decisions and consented to a re-submittal in 1993 once it was learned that the agency did not receive both of his applications. The letter cited on Page 3 of the Petition was not a directive to submit new applications, but a suggested process. R. 353.

for erosion control. Rather, he sought authorization to place fill material on both lots to make them suitable for building, and to construct bulkheads that would function as retaining walls to prevent the fill material from eroding. R. 275, 308.[6]

The activity for which he sought permission, the placement of fill material in tidal wetlands for residential construction, had been deemed illegal since 1977, fourteen years prior to his applications. During that fourteen years McQueen observed his neighbors taking measures to protect their property. During that fourteen years McQueen initiated steps to obtain permits for bulkheads, but then abandoned the process. R. 211. Judge Connor, the dissenter in the S. C. Court of Appeals, summarized McQueen's actions:

> McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to

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[6] Petitioner claims McQueen's property remains in its natural state, while his neighbors have been allowed the opportunity to improve their property. Pet. 2. McQueen's property is, gradually, reverting to its natural state, but neither McQueen, nor his neighbors, purchased property in its natural state. This property was artificially created through a massive dredge and fill operation. McQueen's neighbors improved their "unnatural" property before nature could reclaim it. McQueen ignored the warning signs indicated by the efforts of his neighbors, and waited until it was too late to preserve his property.

> protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless. Resp. App 35.

The Court of Common Pleas for Horry County and the S. C. Court of Appeals determined that McQueen had suffered a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). While there are some obvious similarities between the cases – both property owners owned two non-contiguous lots and both purchased their lots prior to the implementation of the regulatory scheme – any comparison between the two cases is superficial at best.

In 1986, David Lucas purchased two beachfront lots located on the Isle of Palms, in Charleston County, South Carolina, for the purpose of speculative development. In 1988, the South Carolina legislature adopted legislation commonly known as the Beachfront Management Act, as amendments to the 1977 Coastal Zone Management Act. The most controversial aspect of the Beachfront Management Act was its establishment of a "no-construction zone" along S. C.'s coastline. This zone encompassed approximately 30 residential beachfront lots along the

shoreline, including Lucas' two lots on the Isle of Palms, rendering them instantly useless.[7]

Lucas had no notice, or reason to know, in 1986, that the S. C. Legislature would eliminate all value and use of these lots a mere two years after his purchase. Lucas never engaged in the administrative process of seeking permit applications and administrative review. Instead, he initiated a judicial challenge to the Act once its effect on his property was ascertained.[8]

The S. C. Supreme Court recognized the differences between McQueen and Lucas.

> David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S. C. Code Ann. §§ 48-39-250, et seq. (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property.
>
> *In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground – a twenty-fold return on his initial investment. We*

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[7] *See* S. C. Code Ann. § 48-39-290 (repealed 1990). The amendments that repealed this section provided for the issuance of special permits for lots located in this no-construction zone.

[8] "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." *Lucas*, at 1009.

agree with Coastal Council that this case is distinguishable from Lucas. (emphasis added)

Resp. App. 6.

REASONS FOR DENYING THE PETITION

The South Carolina Supreme Court's decision is correct and does not conflict with the decisions of this Court, any other court of appeals, or any state court of last resort. Further review is not warranted.

1. The S. C. Supreme Court's decision is not inconsistent with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In urging this Court to grant certiorari, Petitioner focuses solely on the economic impact of the permit denial. Pet. 1, "Introduction." In fact, the appropriate focus is on the impact of a regulation. The genesis of the categorical taking rule is "[w]here the State seeks to sustain *regulation* that deprives land of all economically beneficial use." *Id.* at 1027 (emphasis added).

This distinction is important, and is overlooked by both Petitioner and by the S. C. Court of Appeals.[9] This case bears no meaningful, factual similarity to *Lucas*.

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[9] The Honorable Ralph King Anderson, Jr. found that "[r]egrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the *denial of the permit* left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding." *McQueen v. South Carolina Coastal Council*, 329 S. C. 588, 496 S.E.2d 643 (Ct. App. 1998) (emphasis added).

"The Beachfront Management Act brought Lucas's plans to an abrupt end." *Id.* at 1008. The regulatory prohibition, promulgated by the South Carolina Coastal Council in 1977 – more than a decade after McQueen purchased his property, had no economic impact on McQueen in 1977. The prohibition did not interfere with his plans to develop these lots. Hundreds of other lots in this area, created from the same dredge and fill operation, were developed, and hundreds of other similarly situated property owners realized their investment expectations, in spite of the adoption of the regulatory scheme. R. 135-136.

The categorical rule adopted in *Lucas* does not extend to McQueen. As Justice Scalia noted, "It seems to us that the property owner *necessarily expects* the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.* at 1027 (emphasis added). Justice Kennedy, in concurring with the judgment, discussed this necessary expectation.

> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. . . . The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate.
>
> . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider reasonable expectations whatever their

> source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. *Id.* at 1034-35.

Petitioner argues that the "conflict" between *McQueen* and *Lucas* is magnified because of their similarity. Petitioner finds the cases similar because both McQueen and Lucas "bought two lots of residential property", sought to use their property for "single-family residences", and both "suffered the loss of all economically beneficial use" of their property. Pet. 19. Respondent doesn't dispute these common, albeit superficial, facts.

The fundamental weakness in McQueen's position is that he was not "stopped cold" (Pet. 19), by a regulatory framework adopted after he acquired his property. The adoption of the regulatory prohibition of filling tidal wetlands did not impede McQueen, in 1977, from realizing his expectations on his two lots. The regulations did not impede McQueen for several years after their adoption. McQueen could have put his property to its highest and best use well into the 1980's. R. 335.

McQueen's property rights were unaffected when the regulatory framework was adopted. Further, S. C.'s regulatory framework is not unique. Its adoption in 1977 was part of a national awakening to the need for stronger wetland protection laws. By 1977 most states had enacted pollution control legislation and resource protection

legislation, in keeping with the incentives provided by federal legislation.[10]

McQueen should have known, after 1977, that if his property eroded and became a wetland again his uses would be restricted. More damaging to McQueen's case, however, is the fact that he possessed actual notice for several years that erosion was threatening his property. He was also on notice that there were methods available to him to protect his property, as he observed the armoring of the shoreline by his neighbors. There simply is no comparison between McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations" (Resp. App. 15), and the plight of David Lucas.

2. The S. C. Supreme Court's reliance on *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) was proper. *Good* is the only case in the body of authority cited by the Petitioner that bears any meaningful resemblance to *McQueen*. The S. C. Supreme Court relied on *Good* because "the principle it articulates applies with equal force here." Resp. App. 15. Good purchased property in the Florida Keys in 1973. At the time of purchase the property was subject to federal regulation through the Rivers and Harbors Act of 1899. After Good acquired his

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[10] *See* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1973); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1972) (leading to the adoption of a multitude of state programs designed to implement the goals of these acts); *see, e.g.* South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 to -350 (1976) (enacted as a result of these federal statutes).

property, numerous state and federal regulatory schemes evolved which ultimately led to the denial of a permit to excavate and fill salt marsh for the creation of a residential subdivision (see fn.10). Good waited seven years after purchase to commence obtaining the necessary approvals to develop the property.

On review of the Federal Court of Claims decision to grant the government's motion for summary judgment, the Court of Appeals for the Federal Circuit discussed the necessity of demonstrating reasonable, investment-backed expectations in the context of delay between time of purchase and the commencement of development.

> Reasonable, investment-backed expectations are an element of every regulatory takings case. See Loveladies Harbor, 28 F.3d at 1179. . . . *Good* at 1361.
>
> The picture emerges, then, of Appellant in 1973 acknowledging the difficulty of obtaining approval for his project, then waiting seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval. . . . While Appellant's prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied. Appellant was aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973-1980. . . . In light of the growing consciousness of and sensitivity toward environmental issues, Appellant must also have been aware that standards could change to his detriment,

and that regulatory approval could become harder to get. *Good* at 1362.

McQueen, like Good, delayed development during a time when "public concern about the environment resulted in numerous laws and regulations affecting land development." *Good* at 1362. Even more significant, McQueen, like Good, purchased property that, at a minimum, was subject to regulation by the federal government at the time of purchase through the Rivers and Harbor Act of 1899. Resp. App. 15. This single fact defeats a takings claim since it is a limitation on use that "inhere[s] in [petitioner's] title." *Lucas, Id.* at 1029. This fact, viewed in the context of McQueen's prolonged neglect of his property, demonstrates a "distinct lack of investment-backed expectations." Resp. App. 15.

3. The S. C. Supreme Court's decision is not in conflict with any decision of any other court of last resort. Petitioner cites *Palm Beach Isles Associates v. United States,* 208 F.3d 1374 (Fed. Cir. 2000). Palm Beach Isles Associates ("PBIA") acquired its property in 1956. The size of the tract acquired was 311.7 acres. The portion of the tract on which the regulatory takings claim is based is a 50.7 acre section that is described as "submerged land adjacent to wetlands." *PBIA* at 1377.

PBIA purchased submerged land, and in 1972, with the adoption of the Clean Water Act and the promulgation of the U.S. Army Corps of Engineers' regulations, PBIA lost the ability to fill this wetland area for development.

There is no indication in *Palm Beach Isles* that, after 1972, the property owner could have proceeded with its

development plans. The Clean Water Act had an immediate impact on the viability of PBIA's development plans for this 50 acre underwater tract. The S. C. Coastal Zone Management Act, however, had no immediate impact on McQueen's development plans.

There are numerous other distinctions between *Palm Beach Isles* and *McQueen*. In *Palm Beach Isles*, the property owner commenced with its development plans immediately by obtaining Corps permits within a year of purchasing the property. Much of the focus of the Court of Appeals was on determining the relevant parcel, an issue that bears no relevance to *McQueen*. The most important and fundamental distinction, however, is that *Palm Beach Isles* is far more akin to *Lucas* than *McQueen*, given the immediate impact of the adoption of the regulatory scheme on the property owner.

State ex rel. Pizza v. Rezcallah et al., 84 Ohio St.3d 116, 702 N.E.2d 81 (1998), cited by Petitioner, also bears no factual resemblance with *McQueen*. This case arose out of convictions for drug use, and efforts by the State of Ohio to require forfeiture and closure of properties occupied by the defendants.

Lopes v. City of Peabody, 629 N.E.2d 1312 (Mass. 1994) is cited by Petitioner as a case in conflict with *McQueen*. At the outset the Massachusetts Court stated that "[t]his action involves the validity of a zoning regulation and does not present a claim for damages as a result of a taking of Lopes's property." *Id.* at 1314. Additionally, Lopes purchased his property six years after the adoption of the zoning regulation. This case certainly does not

establish Petitioner's claim that the S. C. Supreme Court is in conflict with other state courts of last resort.

Petitioner considers *Del Monte Dunes at Monterey, et al. v. City of Monterey, et al.*, 95 F.3d 1422 (9th Cir. 1996) to be a case in conflict with the S. C. Supreme Court. Like *Lopes*, this is a zoning case. This case shares no common ground with *McQueen*. In *Del Monte*, the property owner purchased property known as The Dunes, and immediately commenced the process of seeking the City's approval of development plans. The process was prolonged, and ultimately resulted in a denial several years later. The Court of Appeals for the Ninth Circuit reviewed this matter on appeal from a jury verdict in a section 1983 action. In awarding damages, the jury followed the instructions of the trial judge, which addressed whether the "City's actions must substantially advance a legitimate public purpose" *Del Monte* at 1429. The Court of Appeals affirmed the use of these instructions and the verdict. In dicta, the Court of Appeals discussed that the jury could have also been instructed as to the categorical takings rule set forth in *Lucas*. This dicta certainly does not support an argument that the S. C. Supreme Court is in conflict with the Ninth Circuit Court of Appeals.

Petitioner cites but does not discuss a string of state court decisions. None of them creates a conflict that would warrant this Court's review. In *Kudloff v. City of Billings*, 260 Mont. 371, 860 P.2d 140 (1993), the Supreme Court of Montana quotes from *Lucas, id.*, but then finds the *Lucas* rule inapplicable to the case.

In *McFillan v. Berkeley County Planning Commission*, 190 W.Va. 458, 438 S.E.2d 801 (1993), the West Virginia

Supreme Court cites to the establishment of the categorical rule in *Lucas id.*, but concludes that it is inapplicable to the case. Finally, in *Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528 (1996), and *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730 (1999), the Supreme Court of Wisconsin discussed the categorical taking rule, and found a temporary taking in *Eberle* based on the denial of a permit for a driveway. This case has little in common with McQueen, however, since the Eberles had received approval and then, without warning, lost access to the lot through a change in a zoning ordinance.

There is no conflict between the S. C. Supreme Court's decision in *McQueen, Lucas, id.*, and other courts of last resort. Respondent is aware of no other cases like *McQueen*. No court of last resort has found a taking when a property owner waits fourteen years after the imposition of a regulation to challenge the regulation, and is only affected by the regulation because he allowed the condition of his property to deteriorate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

October 23, 2000

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of
Health and Environmental Control,
Office of Ocean and Coastal
Resource Management, Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity

Opinion No. 25108
Heard February 3, 2000 – Filed April 17, 2000

REVERSED

Mary D. Shahid, of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, of Charleston, for petitioner.

Ronald R. Norton, of Conway, for respondent.

James S. Chandler, Jr., of Pawleys Island, for Amicus Curiae South Carolina Environmental Law Projects.

Glenn Sugameli, of National Wildlife Federation, of Washington, D.C., for Amicus Curiae National Wildlife Federation and South Carolina Wildlife Federation.

BURNETT, A.J.: Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are located on manmade, saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C.Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations, as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking

without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> (2) the property owner had distinct investment-backed expectations; and
>
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen,* 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to *Lucas*. David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-250 et. seq. (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas*, 505 U.S. at 1006-07. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground – a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time

of purchase." *Id.* We do not think this is a valid assumption.[2] Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[ ] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031. We disagree.

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.,* 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee,* 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.,* 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman,* 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct. App. 1984) (citing *Spigener v. Cooner,* 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

In *Carter*, we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "[a]n owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit denial there was a valid exercise of the State's police power to prevent public harm. *Id.* at 204-05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas*. *See, e.g.*, Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 Harv. Envtl. L. Rev. 1, 46 & n.260 (1995) (*Just* is a background principle), Jan Goldman-Carter, Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council, 28 Land & Water L. Rev. 425, 447 & n.138. (1993) (same)[3]; *but see* Joseph L. Sax, Property Rights & the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1440 (1993)

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n.2.

(arguing the *Lucas* Court "repudiat[ed] the conclusion of *Just*"), Richard Ausness, Regulatory Taking & Wetland Protection in the Post-Lucas Era, 30 Land & Water L. Rev. 349, 403-04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the "natural" character of their land.") (citing *Carter, inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state property law that survives *Lucas*.[4] Our opinion in the first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas*

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[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg*, 659 So.2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha*, 538 N.W.2d 538, 534 (Wis. 1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "[n]othing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States*, 39 Fed. Cl. 81, 98 & n.30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059-60 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he thought *Just* fell into the exception carved out by the majority for background principles of state law.

case. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed*, 505 U.S. 1003 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter.*"). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter. Id.* at n.4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just*, the United States Supreme Court repudiated the reasoning of *Just* in *Lucas:*

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, *by requiring land to be left substantially in its natural state* – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

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[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202-04, 314 S.E.2d at 328-29.

Lucas, 505 U.S. at 1018 (emphasis added). The *Lucas* decision made clear the State "must do more than proffer . . . the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."[6] *Lucas*, 505 U.S. at 1031. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas*. *McQueen*, 329 S.C. at 597, 496 S.E.2d at 648.

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central*

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[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed. 1990).

Transp. Co. v. New York City, 438 U.S. 104 (1978), *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), *Mibbs v. South Carolina Dep't of Revenue*, ___ S.C. ___, ___ S.E.2d ___ (1999). Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop. This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor*, 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor*, *Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla.Stat.Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard. *Id.* at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988 allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1368-69.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1369.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be

difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361-62. The court stated that "[w]hile [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed expectations. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 75-76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a

taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we **REVERSE.**

TOAL, A.C.J., MOORE, WALLER, JJ., and acting Justice R. Markley Dennis, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sam B. McQueen, ... Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, ... Appellant.

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity

Opinion No. 2779
Heard December 2, 1997 – Filed January 12, 1998

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Mary D. Shahid, Chief Counsel, S.C. Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (formerly South Carolina Coastal Council), of Charleston, for appellant.

Ronald R. Norton, of Conway, for Respondent.

ANDERSON, J.: Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on manmade, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public

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[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (Supp. 1996).

notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and neighbors wrote to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to

the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1996), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The

master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C. Code Ann. § 48-39-180 (Supp. 1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner,* 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason,* 236 S.C. 158, 113 S.E.2d 544 (1960)). "[T]he substantial evidence standard . . . is the proper standard for review of actions by the Coastal Council." *Id.* at 523-24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.' " *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia,* that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements . . . to act upon applications

within 90 days of the filing." The master noted the significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness, or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter."); *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct.App.1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant*, 319 S.C. 348, 461 S.E.2d 388; *Carter*, 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C. Code Ann. § 48-39-10(J) (Supp. 1996). "Coastal wetlands" means "those areas

based on salt-tolerant vegetation found growing on the lots, *e.g.*, *borrichia frutescens* and *spartina alterniflora*, which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council:* Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "[t]o promote economic and social improvement of the citizens of this State" while "protect[ing] the

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periodically inundated by saline waters . . . and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C. Code Ann. § 48-39-10(G) (Supp. 1996).

sensitive and fragile areas from inappropriate development and provid[ing] adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C. Code Ann. § 48-39-30(1) (Supp. 1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), whereinthe Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 12 Wall. 457, 551, 20 L.Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago,* 99 U.S. 635, 642, 25 L.Ed. 336 (1879). See also *Gibson v. United States,* 166 U.S. 269, 275-276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415, 43 S.Ct., at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.,* at 415, 43

S.Ct., at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct.Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins* 447 U.S., 260; see also *Nollan v. California Coastal*

> *Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra*, 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added).

Id., at 1014-16.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its *Lucas* opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas*.

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The

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[4] In *Carter*, the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas:*

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at

> least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426, 102 S.Ct., at 3171 – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027-1029.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas*, 505 U.S. at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners

ordinarily imports a lack of any common-law prohibition. . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

Lucas, 505 U.S. at 1019.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything with either lot, including park a boat on one. The only use of the land available to McQueen after the permit denials the Council could show was "[r]ecreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the

record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth*, 124 F.3d 632 (4th Cir. 1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs. CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.):

I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner,* 276 S.C. 521, 280 S.E.2d 539 (1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes.

Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall.

The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish."

The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[1]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas*, 505 U.S. at 1006. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007. The United States Supreme Court held Lucas' ability to build on his property was contained in the

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[1] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

"bundle of rights" he acquired when he first bought the property. *Id.* at 1027. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas.*" It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their property. However, McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would

not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright-line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas*, 505 U.S. at 1031. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031 (emphasis added). *See also* 106 Harv. L. Rev. 163 at 272-73 (1992). ("[R]egulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[2]

In *Lucas*, Justice Scalia quoted Lord Coke, who said, "[w]hat is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017 (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st

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[2] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

Am. Ed. 1812)). In 1994, the Federal Circuit of the United States Court of Appeals, interpreting *Lucas* in light of the entire history of regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *See also Property Myths, Judicial Activism, And The Lucas Case*, 23 Envtl. L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, Lucas is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "[t]his lot, by the passage of *time* and *tides* for the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas:* "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031. However, the omitted

phrase reads as follows: "[T]hough changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor.* As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment."

I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become s critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**FIFTEENTH JUDICIAL CIRCUIT**
	)	**Case No. 94-CP-26-3154**
SAM B. MCQUEEN,	)	
Plaintiff,	)	
-vs-	)	**FINAL ORDER**
SOUTH CAROLINA COASTAL COUNCIL, n/k/a SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT,	)	**(Filed March 5, 1996)**
Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made

canals and were created by fill. The lots are Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter came before this court on January 5, 1996, for review pursuant to § 48-39-180, *Code of Laws of South Carolina*. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the United States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are

unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management (hereinafter OCRM), for two permits, one for each lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. § 48-39-150(c), *Code of Laws of South Carolina*. The testimony at the evidentiary hearing, however, reveals that

Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2-24; page 23, lines 18-25; page 24, lines 1-2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2-5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted that Mr. McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corp of Engineers, the S.C. Department of Health and

Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sought review of the OCRM's action "de novo" pursuant to § 48-39-180, *Code of Laws of South Carolina*. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sought to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, § 48-39-30(c), *Code of Laws of South Carolina*, and § 48-39-180, *Code of Laws of South Carolina*,

requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. *The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property Under the Fifth and Fourteenth Amendments of the U.S. Constitution requiring the Payment of Just Compensation.*

Plaintiff, Sam McQueen, is entitled to just compensation pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§ 48-39-30 and 48-39-180, *Code of Laws of South Carolina*. See *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. US 119 L.Ed.2d 561 and rev'd US 120 L.Ed.2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina Coastal Council* (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992 decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme

Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, supra, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13-25; page 20, lines 1-6). Mr. Chinnis confirmed this. (TR page 72, lines 23-25; page 73, lines 1-8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1-6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be

paid to sustain it. The state may not transform private property into public property without compensation." *Lucas*, supra.

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963 before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that . . . the Act is taking nothing."

Lucas, supra, p. 2902. Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, ___ SC ___, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could *not* uncover any such common law principle. *Lucas*, supra.

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property in 1987, after the 1977 Act, and the property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a

three prong test for determining if there has been a regulatory taking.

1. If there was a denial of economically viable use of the property as a result of the regulatory imposition;

2. the property owner had distinct investment-backed expectations; and

3. it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the Panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision to seek a permit is insufficient to conclude that the property owner had no

investment-backed expectations. In addition, the Defendant failed to submit any evidence to support his argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, liens 11-13). The law is clear that a property owner can offer testimony as to the value of his property. The OCRM did not offer any testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, the OCRM did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) If find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as is set forth in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992)

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are

incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth

above, the Plaintiff is entitled to just compensation in the sum of $50,000.000 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this order.

AND IT IS SO ORDERED.

/s/ John L. Breeden, Jr.
John L. Breedan, Jr.
Master in Equity

Dated: Feb. 28, 1996
Conway, South Carolina

'STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) BEFORE THE COASTAL) ZONE MANAGEMENT) APPELLATE PANEL) CC-93-154 and CC-93-155	
Sam McQueen, Appellant, vs. South Carolina Coastal Council, Appellee,	) FINAL ADMINISTRATIVE ORDER	

This matter was before the Coastal Zone Management Appellate Panel for oral arguments on July 28, 1994, in Charleston, South Carolina. Present at this hearing were Ronald R. Norton, Esquire, representing the Appellant, Sam McQueen and Mary D. Shahid, Chief Counsel for Appellee South Carolina Coastal Council.

This is an appeal of Coastal Council staff's denial of permit application numbers CC-93-154 and CC-93-155. The stated purpose of the applications was to construct a bulkhead for erosion control in order to create buildable property at Lot 13, 48th Avenue North and Lot 37, 53rd Avenue North, North Myrtle Beach, in Horry County, South Carolina. This matter was referred to Robert J. Moran, Jr., to conduct an evidentiary hearing and issue findings of fact. The hearing in this matter was conducted on January 21, 1994.

Based on the record before us, including the transcript of the evidentiary hearing, the exhibits, the hearing

officer's findings, and the arguments of all parties, we make the following findings of fact:

1. Sam McQueen is the owner of two separate, non-contiguous lots in the Cherry Grove section of North Myrtle Beach, Horry County, South Carolina.

2. Lot 37, Block Q-1 (herein referenced to as 53rd Avenue lot) was purchased by McQueen in 1961 for $2,500.00. Lot 13, Block L-1 (herein 48th Avenue lot) was purchased by McQueen in 1963 for $1,700.00. Both lots are unimproved and have been so since their acquisition by McQueen. McQueen has paid taxes on these lots since his purchase. They are both valued at $22,500.00 for tax purposes.

3. In 1991 McQueen applied for two permits, one for each lot, the purpose of each being to place a bulkhead and backfill on the individual lots in order to make the lots suitable for building. McQueen's additional stated purpose for the bulkheads is for erosion control, both on his lots and for the benefit of his adjacent neighbors.

4. Both lots are located on man-made, dead-end, salt water canals. Most, if not all, of the other lots on 48th and 53rd Avenues are improved and contain some type of bulkhead or retaining wall.

5. Due to an error in the public notice only one of the initial permit applications was acted upon. On January 21, 1992, a permit was issued for the 53rd Avenue lot, with the special condition that the bulkhead be located no further than seventy-five (75) feet from the front (street side) property line (Appellant's Exhibit 2). McQueen did

not accept the terms of this permit and indicated his intention to appeal.

6. Due to the lack of action on the 48th Avenue lot and the unsatisfactory result of the 53rd Avenue lot permit the parties agreed to resubmit both permits in 1993. They went out on public notice on June 17, 1993.

7. South Carolina Department of Health and Environmental Control, State Ports Authority, and the South Carolina Department of Archives and History voiced no objection to the permits. The South Carolina Wildlife and Marine Resources Department offered no objection "provided the bulkhead is placed against the existing erosional scarp and landward of wetland vegetation." Mr. McQueen's neighbors on 43rd Avenue both requested issuance of the permit.

8. On September 13, 1992, both permits were denied by Council staff. Staff's position was primarily that McQueen's lots had both substantially reverted to wetlands, and that bulkheading would have the effect of creating buildable land by the filling of wetlands.

9. McQueen's grounds for appeal as to both permit denials are contained in an October 6, 1993, letter from his attorney. The thrust of his appeal centers around the following: erosion control on McQueen's and adjacent lots; the lots have existed for many years in their present configuration, these lots were originally man-made, and the bulkhead and fill will only serve to refill a previously disturbed area; adverse effects on the canals from sedimentation; approval under U.S. Army, Corps of Engineers Nationwide Permit, and a total devaluation of the lots amounting to an unconstitutional "taking".

10. Staff's perception of the lots is contained in two drawings which depict the existence of both well established and emergent wetland vegetation.

11. Lot 13 on 48th Avenue is described by the S.C. Coastal Council staff biologist in the evidentiary hearing as a large area of critical area vegetated with borrichia, spartina patens and spartina alterniflora.

12. Lot 37 on 53rd Avenue is described as attaining greater tidal flow than Lot 13, and is at a lower elevation than lot 13. It is unvegetated, filled with brack and other decaying critical area plants. This lot is observed to have tidal inundation reaching from the canal to the road.

13. While these lots differ in description and in terms of vegetation, it is clear that both lots are predominantly critical area.

14. The critical area found at Lot 13 on 48th Avenue is high marsh. High marsh serves the vital function of acting as a buffer and a filter from sediments and pollutants in runoff. This lot also provided a critical area habitat for birds, shellfish, and fish.

15. Lot 37 on 53rd Avenue is unvegetated. Unvegetated sand flat type critical area serve as integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life.

16. This Panel has never quantified or attempted to assign a value to the various critical areas. This appeal is an excellent example of the wisdom of this policy, since the Permit Coordinator for the Council's Myrtle Beach office, the Hearing Officer, and the staff biologist all came

to varying conclusions when they attempted to rank the importance of the critical area functions of these lots.

17. The erosion on these lots started as early as 1974. As late as 1989 this erosion was still not characterized as "severe". McQueen took no action to protect his property from erosion since the time of purchase in 1961 until these applications were initiated.

18. McQueen's neighbors on either side of these lots have bulkheads. They can apply for a permit to construct wingwalls to tie into their bulkheads in order to remedy any erosion caused by the ebb and flow of the tide on McQueen's lots.

Based on these findings we make the following conclusions of law:

1. S.C. Rules and Regulations for permitting in the Critical Area, R.30-12G(2)(a) expressly prohibits the activity sought by these applications.

> The creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes shall be denied.

This regulation expressly prohibits the activity sought by McQueen.

2. The statutory definition of tidelands critical area includes " . . . those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses. . . . "

S.C. Code of Laws § 48-39-10(G). (1976). Therefore, the fact that these lots are adjacent to a salt-water canal which was created by the U.S. Army Corps of Engineers, as raised in Appellant's grounds, is irrelevant.

3. McQueen claims that the action of this agency in denying these permits amounts to a taking. The issue of whether denial of a permit to fill tidelands critical area is a taking was resolved by the S.C. Supreme Court in *Robert W. Carter v. The South Carolina Coastal Council*, 314 S.E. 2d 327 (S.C. 1984). In *Carter* the court held the following:

> Controlling and restricting the filling of wetlands is clearly within the scope of the State's police power, as the legislature enacted the Coastal Zone Management Act in response to its recognition of the detrimental effect the uncontrolled use of coastal wetlands would have on the public welfare . . . the Council's action constituted a legitimate exercise of the State's police power, rather than an unreasonable "taking" of respondent's property.

If a case like *Carter v. South Carolina Coastal Council* was to be brought before the Supreme Court a decade after their decision in *Carter*, we presume that the court will expand its opinion in light of recent takings decisions regarding permits for fill in wetlands. Perhaps the most important of these decisions is *Loveladies Harbor, Inc., et al. v. United States*, ___ F 2d ___, (1994). *Loveladies* contains a three pronged test for determining if there has been a regulatory taking. 1) If there was a denial of economically viable use of the property as a result of the regulatory

imposition; 2) the property owner had distinct investment-backed expectations; and 3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies arose out of a denial of a permit for fill in freshwater wetlands. We believe that the value and functions of tidelands critical area may differ from that of freshwater wetlands. Therefore, we do not concede that *Loveladies* and successive freshwater wetland cases control our disposition of this issue. However, we do find that the Appellant fails to satisfy at a minimum the second prong of the test in that his expectations are relative to the measures he took to protect his investment. The record reflects that the Appellant was on notice of erosion at these lots for several years, and that these lots were buildable as recently as 1989. Appellant failed to act to protect his property.

Therefore, we conclude that Appellant has failed to demonstrate that the action taken by this agency in denying both applications for fill amounts to an unconstitutional taking.

Based on these findings of fact and conclusions of law we find that the action of staff in denying both applications should be upheld.

AND BY A VOTE OF 11 TO 1, THE DENIAL OF PERMIT APPLICATION NUMBER CC-93-154 IS HEREBY UPHELD.

AND BY A VOTE OF 8 T0 4, THE DENIAL OF PERMIT APPLICATION NUMBER CC-93-155 IS HEREBY UPHELD.

AND IT IS SO ORDERED.

/s/ Keith M. Kinard, Chairman
Keith M. Kinard, Chairman
Coastal Zone Management
Appellate Panel
(*formerly South Carolina Coastal Council*)

Charleston, South Carolina

October 7, 1994

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
Clerk of Court
BRENDA F. SHEALY
Deputy Clerk

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May 24, 2000

Ronald R. Norton, Esquire
P O Box 1147
Conway, SC 29528

Re: McQueen, Sam B. v. SC Coastal Council

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied".

/s/ Jean H. Toal C.J.
/s/ James E. Moore J.
/s/ John. Waller, Jr. J.
/s/ E.C. Burnett, III J.

May 24, 2000."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh

(6)

No. 00-285

Supreme Court, U.S.
FILED
NOV 1 2000
CLERK

IN THE

Supreme Court of the United States

SAM B. MCQUEEN,
Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief in opposition contains several points that call for a reply. None of them succeeds in casting doubt on the suitability of this case for plenary review.

I. OCRM HAS FAILED TO ELIMINATE THE CONFLICT AMONG LOWER COURTS PRESENTED BY THIS CASE

As the petition explains, "The decision below creates a deep national split of authority, which . . . involves decisions of the U.S. Courts of Appeals for the Federal Circuit, the Eighth Circuit, and the Ninth Circuit, as well as the highest courts of Colorado, Massachusetts, Ohio, and South Carolina." Pet. 10–11. Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) contends that the decision below is "not in conflict with any decision of any other court of last resort." Br. Opp. 13. This argument is without merit.

OCRM tries to explain away the conflict between the decision below and *Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000) by distinguishing between laws that immediately restrict property use and those that do not. Br. Opp. 14. But this distinction has no relevance. The decision below did not rest on what OCRM calls "the immediate impact of the adoption of the regulatory scheme." *Id.* Instead it rested on the lower court's determination that Mr. McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." Pet. App. 13a.

OCRM also contrasts Mr. McQueen's delay in seeking development permits with the property owner in *Palm Beach Isles*, which "commenced with its development plans immediately by obtaining Corps permits within a year of purchasing the property."

Br. Opp. 16. But Mr. McQueen's delay does not eliminate the conflict. Whether the Fifth Amendment allows OCRM to deny him compensation on the ground that he delayed seeking permits *is* the question presented. Pet. at i. The conflict involving *Palm Beach Isles* remains.

OCRM makes a feeble effort to remove the conflict with *State ex rel. Pizza* v. *Rezcallah*, 702 N.E.2d 81 (Ohio 1998) by pointing out that it "arose out of convictions for drug use." Br. Opp. 14. But this fact has no bearing on the existence of a conflict. A conflict of authority gives this Court reason to grant certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." SUP. CT. R. 10(b). Determining whether two decisions conflict on a question arising under the Takings Clause turns not on the subject matter of the regulation, but on the impact of that regulation on the private property owner. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 174 (1979). The conflict involving *Rezcallah* remains.

OCRM endeavors to eliminate the conflict with *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994) on two grounds. OCRM notes that the *Lopes* Court addressed the owner's takings claim in the context of a challenge to the validity of a regulation, rather than as a claim for damages, and that "Lopes purchased his property six years after the adoption of the zoning regulation." Br. Opp. 14. Neither fact eliminates the conflict. The form of relief has no bearing on the question presented, which is broadly phrased in terms of "whether an owner has suffered a taking." Pet. at i. And just because Lopes acquired his land "six years *after* the adoption of the zoning regulation," *id.* (emphasis added), does not explain away a conflict arising from the Massachusetts court's

willingness to apply *Lucas* regardless of the owner's investment-backed expectations. *See* 629 N.E.2d at 1316. The conflict involving *Lopes* remains.

OCRM tries to chip away at the conflict with *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds sub nom. City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). OCRM makes the sweeping assertion that *Del Monte Dunes* "shares no common ground with *McQueen*" because, "[l]ike *Lopes*, this is a zoning case." Br. Opp. 15. As we explained earlier, the field of law from which a question arises is irrelevant when determining whether two decisions present a conflict that merit this Court's review.

OCRM next attempts to eliminate the conflict with *Del Monte* by claiming that the language cited by Petitioner is dicta. Br. Opp. 15. On this point OCRM is mistaken. The court squarely addressed "whether "[t]he jury also could have found the City liable for a taking because it denied Del Monte all economically viable use of its property." 95 F.3d at 1432. That question, in turn, formed a necessary part of reviewing the city's motion for judgment notwithstanding the verdict on Del Monte's inverse condemnation claim. *Id.* at 1430. The verdict was based on the court's instruction to decide in favor of Del Monte "if (1) all economically viable use of the property had been denied; or (2) the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose." *Id.* at 1426. This instruction obligated the Ninth Circuit to discuss the correct legal standard under *Lucas*, which was part of the court's holding. Hence the conflict involving *Del Monte* remains.

OCRM concedes that *Good* v. *United States*, 189 F.3d 1355 (Fed Cir. 1999) bears a "meaningful resemblance" to the decision below. Br. Opp. 11. Yet it entirely ignores *Outdoor Graphics, Inc.* v. *City of Burlington*, 103 F.3d 690 (8th Cir. 1996) and *State of Colorado, Department of Health* v. *The Mill*, 887 P.2d 993 (Colo. 1994), both of which demonstrate that the decision below accords with decisions of other state courts of last resort and United States courts of appeals. These cases, when contrasted with *Palm Beach Isles*, *Rezcallah*, *Lopes*, and *Del Monte*, create "a deep national split of authority" that amply justifies this Court's review. Pet. 10.[1]

II. OCRM HAS FAILED TO ELIMINATE THE CONFLICT BETWEEN THE DECISION BELOW AND *LUCAS* v. *SOUTH CAROLINA COASTAL COUNCIL*

OCRM next asserts that "[t]he S.C. Supreme Court's decision is not inconsistent with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)." Br. Opp. 8. A double negative cannot save this sentence from absurdity. Not only are the decisions inconsistent, they are irreconcilable.

In *Lucas* the Court explained that the Fifth Amendment obligates the government to pay compensation when a property owner can demonstrate that his is the "extraordinary circumstance when *no* productive or economically beneficial use of land is

---

[1] Beyond its efforts to remove this conflict, OCRM insists that *Kudloff* v. *City of Billings*, 860 P.2d 140 (Mont. 1993); *McFillan* v. *Berkeley County Planning Comm'n*, 438 S.E.2d 801 (W. Va. 1993); and *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) do not "create[ ] a conflict that would warrant this Court's review." Br. Opp. 15. OCRM's protest is misplaced. Petitioner cited these cases not to suggest that they conflict with the decision below, but to illustrate "the confusion afflicting many lower courts over the correct interpretation and application of *Lucas*." Pet. 18.

permitted." *Lucas*, 505 U.S. at 1017. That crucial, decisive fact of regulatory confiscation is not only supported by the record in this case, it is "*uncontested*." Pet. App. 4a (emphasis added). Indeed, OCRM continues to concede that McQueen has "'suffered the loss of all economically beneficial use'" of his property. Br. Opp. 10 (quoting Pet. 19). Although OCRM labels this fact "superficial," *id.*, *Lucas* makes it clear that proof of total confiscation categorically entitles Mr. McQueen to compensation. *See Lucas*, 505 U.S. at 1016. The lower court's unwillingness to draw that conclusion establishes a conflict that OCRM cannot simply explain away. Nevertheless, it tries.

OCRM writes that "[t]he categorical rule adopted in *Lucas* does not extend to McQueen." Br. Opp. 9. To support this astonishing claim, OCRM quotes the following passage from the opinion of the Court in *Lucas*: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." 505 U.S. at 1027.

This quotation lends no support to OCRM's argument. Even if Mr. McQueen "necessarily expect[ed] the uses of his property to be *restricted*," *id.* (emphasis added), *Lucas* repeatedly affirms that he would not reasonably expect that all economically beneficial uses of his property would be totally *abolished*. Indeed, at the end of the paragraph from which OCRM took the sentence above, the Court underscored exactly this point:

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently

> eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Id. at 1028.

OCRM also tries to enlist Justice Kennedy's concurring opinion in its cause. *See* Br. Opp. 9–10. However, as an opinion concurring in the judgment, it formed no part of the opinion of the Court. *See Lucas*, 505 U.S. at 1005. It is inapposite in considering whether the decision below conflicts with *Lucas*.

OCRM then argues, "In urging this Court to grant certiorari, Petitioner focuses solely on the economic impact of the permit denial. . . . In fact, the appropriate focus is on the impact of a regulation." *Id.* at 8. Between "the economic impact of the permit denial" and "the impact of a regulation" lies a distinction without a difference. Like OCRM's other efforts at distinguishing *Lucas*, this distinction reflects an attempt to artificially narrow the holding in *Lucas* to its facts. The Court in *Lucas* mentioned that the regulation there immediately affected the property only in passing, as part of its recitation of the facts. *See Lucas*, 505 U.S. at 1009–10. The immediacy of the regulation's effect on the property appears nowhere in the Court's extensive discussion of the categorical rule affirming a property owner's right to compensation for confiscatory regulations. *See id.* at 1015–16, 1019, 1027–28, 1031–32.

OCRM also charges that the decision below differs from *Lucas* because "Lucas had no notice, or reason to know, in 1986, that the S.C. Legislature would eliminate all value and use of these lots a mere two years after his purchase." Br. Opp. 7. But the question of notice did not figure in the Court's holding in *Lucas*. *See* 505 U.S. at 1031–32.

More importantly, Lucas's lack of notice in 1986 closely resembles Mr. McQueen's lack of notice in 1961. Neither owner knew when he purchased his property that the State of South Carolina would later regulate it to the point of confiscation. For all these reasons, the conflict between the decision below and this Court's decision in *Lucas* remains.

III. OCRM'S OTHER CONTENTIONS ARE EQUALLY UNAVAILING

OCRM suggests that Mr. McQueen's constitutional right to compensation has eroded with his land. That is the import of OCRM's statement that "McQueen, like Good, delayed development during a time when 'public concern about the environment resulted in numerous laws and regulations affecting land development.'" Br. Opp. 13 (quoting *Good* v. *United States*, 189 F.3d 1355, 1362 (Fed. Cir. 1999). Not only does this statement beg the question presented, namely whether a delay in developing real property excuses a government agency from paying the owner compensation when a regulation is totally confiscatory. Pet. at i. It ignores the practical difficulties[2] and unfairness of denying compensation based on a land use practice (developing real property after lengthy delays) both widespread and supported by settled principles of law. *See* Br. Amicus Curiae Nat'l Assoc. Home Builders & Cal. Bldg. Indus. Assoc. at 6–10 (Oct. 20, 2000).

OCRM adds insult to injury by maintaining that Mr. McQueen has only himself to blame for his loss. That is the evident meaning behind OCRM's contention that his property became subject to the Coastal Zone Management Act (Act), S.C. Code Ann.

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[2] Such practical difficulties may be financial, *see, e.g.*, R. 206, or medical, as in the case when a property owner is physically or mentally unable to pursue development plans.

§§ 48-39-10–220 (1993), and therefore legitimately within OCRM's statutory jurisdiction, only because Mr. McQueen stood by while erosion transformed it into a protected wetland. Br. Opp. 2, 3, 10, 11. This argument is both incorrect and beside the point.

Incorrect because the Act expressly prohibits an owner to "erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." S.C. Code Ann. § 48-39-130(C). Even though "[t]he construction of a bulkhead is an allowable activity," Br. Opp. 3, it is one requiring the owner to obtain a permit. OCRM admits as much when it acknowledges that "in the early 1980's McQueen became aware of the need for a permit to erect a bulkhead." *Id.* Passage of the Act, not erosion, imposed on Mr. McQueen the legal obligation to obtain a permit before developing his property.

Moreover, OCRM's argument, even if true, has no bearing on the merits of the petition. The decision below did not rest on whether he could demonstrate "the immediate impact of the adoption of the regulatory scheme." *Id.* Instead that decision held that Mr. McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." Pet. App. 13a. OCRM's contention that the 1977 Act did not immediately restrict Mr. McQueen's is therefore not pertinent to deciding whether certiorari is merited.

OCRM also charges that Mr. McQueen "waited until it was too late to preserve his property." Br. Opp. 5 n.6. This is contradicted by OCRM's statement that "[i]n 1991, when McQueen finally decided to develop these lots, the lots could no longer support residential construction without the addition of

truckloads of fill material." Br. Opp. 4. If his property remained capable of "support[ing] residential construction" with the addition of backfill, *id.*, then it was not "too late to preserve." *Id.* at 5 n.6.

Finally, OCRM asserts that Mr. McQueen's takings claim is defeated, because he bought his property subject to The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994). *See* Br. Opp. 13. However, this act does not furnish "background principles of nuisance and property law that prohibit," *Lucas*, 505 U.S. at 1031, Mr. McQueen from putting up bulkheads and adding backfill to his property. As an initial matter, OCRM has not preserved the issue. Its only attempt to mount a defense on the ground of "background principles" met with a firm rebuff by the court below when it held that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d 327 (1984) was overruled by *Lucas*. Pet. App. 9a.

Besides, OCRM's own statements contradict the notion that its permit denials were defensible as a matter of generally-applicable nuisance or property law. OCRM states that "surrounding, similarly situated property owners began installing bulkheads to prevent erosion as early as 1968." *Id.* at 2–3. Even after South Carolina set out to protect tidal wetlands, "[h]undreds of other lots in this area, created from the same dredge and fill operation, were developed, and hundreds of other similarly situated property owners realized their investment expectations, in spite of the adoption of the regulatory scheme." *Id.* at 9. Given this record, OCRM has no basis to argue that background principles of law obliged it to prevent Mr. McQueen from developing his property. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . ." *Lucas*, 505 U.S. at 1031.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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